(8)

No. 04-1376
Title: Humberto Fernandez-Vargas, Petitioner
v.
Alberto R. Gonzales, Attorney General
Docketed: April 14, 2005
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (03-9610)
Decision Date: January 12, 2005

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 12 2005	Petition for a writ of certiorari filed. (Response due May 16, 2005)
May 11 2005	Order extending time to file response to petition to and including June 15, 2005.
May 31 2005	Order further extending time to file response to petition to and including July 15, 2005.
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Sep 27 2005	Brief of respondent Alberto R. Gonzales, Attorney General filed.
Oct 11 2005	Reply of petitioner Humberto Fernandez-Vargas filed. (Distributed)
Oct 12 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	Petition GRANTED.
Nov 14 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 22, 2005.
Nov 14 2005	Extension of time to file respondent's brief on the merits to and including February 2, 2006.
Dec 2 2005	Motion to dispense with printing the joint appendix filed by petitioner Humberto Fernandez-Vargas. (Distributed)
Dec 12 2005	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 22 2005	Brief of petitioner Humberto Fernandez-Vargas filed.
Dec 22 2005	Brief amici curiae of American Immigration Law Foundation, et al. filed.
Jan 23 2006	SET FOR ARGUMENT on Wednesday, March 22, 2006.
Jan 23 2006	CIRCULATED.
Jan 31 2006	Extension of time within which to file respondent's brief on the merits to and including February 8, 2006.
Feb 8 2006	Brief of respondent Alberto R. Gonzales, Attorney General filed. (Distributed)
Feb 13 2006	Record received from U.S.C.A. - Tenth Circuit.
Mar 14 2006	Reply of petitioner Humberto Fernandez-Vargas filed. (Distributed)
Mar 22 2006	Argued. For petitioner: David M. Gossett, Washington, D.C. For respondent: Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C.
Mar 29 2006	Letter from the Solicitor General received. (Distributed).
Mar 30 2006	Letter from counsel for the petitioner received. (Distributed)

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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress enacted § 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5). Under this provision, if an alien reenters the country illegally "after [previously] having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under [the INA]." *Ibid.*

The question presented—on which there is a well-established circuit split—is whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally ***before*** the effective date of IIRIRA, April 1, 1997.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Humberto Fernandez-Vargas, respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 394 F.3d 881. The November 7, 2003, final order of the Bureau of Customs and Immigration Enforcement ("BICE") (App., *infra*, 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

Section 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5),[1] as enacted by § 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), provides:

> If the Attorney General finds that an alien had reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

[1] All citations to INA and IIRIRA sections will initially include their corresponding United States Code sections. Thereafter, they will be referred to only by their INA or IIRIRA numbers.

IIRIRA § 309(a), codified as note following 8 U.S.C. § 1101, provides in relevant part:

> [T]his subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act [*e.g.*, April 1, 1997].

INA § 242(f) (1994), 8 U.S.C. § 1252(f) (1994), repealed by IIRIRA § 306(a)(2), provided in relevant part:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.

STATEMENT

This case presents the important and recurring question whether INA § 241(a)(5)—under which the government may reinstate prior deportation orders against aliens who have illegally reentered the United States after having been previously deported and, by so doing, prevent such aliens from seeking or obtaining any form of relief from deportation—applies to aliens who reentered the United States prior to the effective date of that statute. The ten federal courts of appeals that have addressed this question are avowedly split over the issue.

Two courts have held—under the first stage of a *Landgraf* retroactivity analysis (see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994))—that Congress intended to apply INA § 241(a)(5) only prospectively to aliens who reentered the United States after IIRIRA's effective date. Eight other

courts have disagreed and held that Congress did not clearly express an intent as to the statute's temporal applicability. Among those eight courts, however, four have held that, in at least certain circumstances, it would give the statute an impermissible retroactive effect under the second stage of a *Landgraf* analysis to apply it to aliens who had reentered the United States prior to IIRIRA's effective date. By contrast, two of those eight courts—including the court of appeals below—have held that application of the substantive provisions of INA § 241(a)(5) to aliens who reentered the United States prior to IIRIRA's effective date is not impermissibly retroactive.[2]

Because this circuit split will not go away absent this Court's intervention, because the issue greatly affects the lives of countless individuals—both undocumented aliens and U.S. citizens related to those aliens—and because the Tenth Circuit's decision in this case is plainly wrong, review by this Court is clearly warranted.

A. Statutory Background

Prior to 1997, the INA provided that, if an alien who had been deported for certain enumerated reasons (*e.g.*, persons convicted of aggravated felonies) illegally reentered the United States, "the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." INA § 242(f) (1994), 8 U.S.C. § 1252(f) (1994). While the consequences of such reinstatement could be relatively swift and harsh, Congress drafted the statute narrowly. That reinstatement provision did not apply to aliens who were initially deported simply for entering the country without inspection or for any other reason not specifically enumerated in INA § 242(e) (1994), 8 U.S.C. § 1252(e) (1994). Moreover, under pre-1997 immigration

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[2] The remaining two courts did not confront this issue.

law, aliens who had unlawfully reentered the United States after a previous deportation could apply for various forms of relief from further removal, even if their previous deportation orders were subject to reinstatement. For example, INA § 245(i) allowed aliens who met certain conditions to avoid removal by seeking and obtaining a discretionary adjustment of status to lawful permanent resident. 8 U.S.C. § 1255(i) (1994). This discretionary relief was available to aliens who, like petitioner herein, were married to a United States citizen who filed a visa petition on the alien's behalf.[3]

In 1996, Congress dramatically changed this legal landscape by adopting IIRIRA. Effective April 1, 1997 (see IIRIRA § 309(a)), IIRIRA repealed INA § 242(f) and replaced it with INA § 241(a)(5). This new reinstatement provision differs from its predecessor in several significant ways.

First, while under the old regime only illegal reentrants who had been deported on certain specified grounds were subject to having their prior removal orders reinstated, INA § 241(a)(5) applies broadly to all aliens who were previously removed. See App., *infra*, 10a; see also, *e.g.*, *Bejjani* v. *INS*, 271 F.3d 670, 675 (6th Cir. 2001).

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[3] Other forms of relief from deportation were also available to aliens who had unlawfully reentered the country. For example, relief under INA § 245(i) was available to aliens who had an application for labor certification filed on their behalf. 8 U.S.C. § 1255(i). Moreover, before enactment of INA § 241(a)(5), a prior order of removal was, in certain circumstances, subject to collateral attack in a subsequent deportation proceeding. See, *e.g.*, *Matter of Farinas*, 12 I. & N. Dec. 467 (BIA 1967) (allowing collateral attack to avoid gross miscarriage of justice); *Matter of Malone*, 11 I. & N. Dec. 730 (BIA 1966) (same). Prior removal orders could also be reopened when an alien could "make a *prima facie* showing that he or she is eligible for relief." *Wiedersperg* v. *INS*, 896 F.2d 1179, 1182 (9th Cir. 1990).

Second, INA § 241(a)(5) specifies that the prior order of removal is "not subject to being reopened or reviewed," and thus is no longer subject to any type of collateral challenge. See *Bejjani*, 271 F.3d at 675.

Finally, as noted above, the prior statute allowed aliens subject to reinstatement to petition for relief from deportation under other sections of the INA. The IIRIRA's reinstatement provision deems all illegal reentrants ineligible to receive ***any*** form of relief under the INA, other than a claim for asylum. See INA § 241(a)(5); App., *infra*, 11a; *Bejjani*, 271 F.3d at 675.[4]

Consequently, application of this new statute operates to deny to a large class of aliens relief that could have been afforded under the old regime.

B. Factual Background

Petitioner Humberto Fernandez-Vargas is a native and citizen of Mexico. He has lived in the United States illegally since the 1970s. See App., *infra*, 3a. During the 1970s and early 1980s petitioner was deported from the United States several times for immigration violations, most recently in late 1981. See App., *infra*, 3a, 26a. In January 1982, shortly after his last deportation, petitioner again reentered the United States without inspection. App., *infra*, 3a, 19a. During the

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[4] The LIFE Act Amendments of 2000 made INA § 241(a)(5) inapplicable to aliens who apply for relief under certain asylum statutes. See Pub. L. No. 106-554 § 1503(c), 114 Stat. 2763, 2763A-325 (2000); see also 8 C.F.R. § 241.8(d) ("If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105-277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105-100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply.").

next twenty years Mr. Fernandez resided primarily in Utah, worked as a truck driver, owned his own trucking business, and was never arrested for any reason. See A.R. 41-42.[5]

On March 30, 2001, petitioner married Rita Fernandez, a United States citizen, with whom he has a 16 year old son, Anthony. See App., *infra*, 3a. (Anthony also is a United States citizen. See A.R. 42.) Thereafter, Mrs. Fernandez filed a relative visa petition on behalf of petitioner pursuant to INA § 201(b), 8 U.S.C. § 1151(b), and the Fernandezes filed an application for adjustment of status under INA § 245(i). See App., *infra*, 3a-4a, A.R. 41-46. The Fernandezes paid the $1000.00 "penalty" fee for petitioner having entered the United States without inspection; the Immigration and Naturalization Service ("INS") accepted the Fernandezes' application and fee notwithstanding Mr. Fernandez's illegal reentry. See A.R. 45-46. Indeed, in light of the pending application for adjustment, the Bureau of Citizenship and Immigration Service ("BCIS")—the agency within the Department of Homeland Security that replaced the INS—provided petitioner with employment authorization. See 10th Cir. Pet. Rev. 3-4.

On or about November 1, 2003, Mr. Fernandez appeared at the Salt Lake City BCIS office for a routine interview on his visa petition. Once he arrived, however, he was arrested by an officer of BICE, based on BICE's assertion that Mr. Fernandez's 1981 deportation order was subject to reinstatement under INA § 241(a)(5) and that as a result Mr. Fernandez's application for adjustment of status under INA § 245(i) was statutorily barred. See App., *infra*, 4a. On November 7, 2003, BICE ordered Mr. Fernandez's prior order of removal to be reinstated, and ten days later the agency issued a warrant commanding that Mr. Fernandez be removed from the

[5] A.R. refers to the Certified Administrative Record before the Tenth Circuit.

United States. See App., *infra*, 4a, 19a-28a. On September 6, 2004, while this case was pending in the Tenth Circuit, Mr. Fernandez was removed from the United States to Juarez, Mexico. His wife and son remain in Utah.

C. Proceedings Below

Pursuant to INA § 242(a) & (b)(2), 8 U.S.C. § 1252(a) & (b)(2), and 28 U.S.C. § 2352, petitioner sought review of the BICE decision in the Tenth Circuit. Petitioner contended that because he had reentered the United States before the effective date of IIRIRA—April 1, 1997—INA § 241(a)(5) did not apply to his case, and therefore BICE had erred in reinstating the previous order of removal and in refusing to allow him to seek an adjustment of status under INA § 245(i) and/or INA § 212(i), 8 U.S.C. § 1182(i).

The court of appeals' resolution of the case turned on the question whether INA § 241(a)(5) applied despite the fact that Mr. Fernandez had reentered the United States before the effective date of IIRIRA. The court analyzed this question using the analytical framework articulated by this Court in *Landgraf* for determining whether a federal statute applies to pre-enactment conduct despite the strong historical presumption against retroactivity. Expressly noting that the issue had split the federal circuits (see App., *infra*, 12a), the Tenth Circuit held that INA § 241(a)(5) applied to Mr. Fernandez. See App., *infra*, 18a.

Under *Landgraf*, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280.[6] Rejecting the con-

[6] The Tenth Circuit has modified *Landgraf*'s two-step framework by splitting this first step into two, the first focusing on whether Congress has ***explicitly*** addressed the temporal reach of a statute and the second addressing whether, if not, the court can determine congressional intent using ordinary rules of statutory interpretation. See App., *infra*, 10a-11a (quoting *Jurado-Gutierrez* v.

trary decisions of the Sixth and Ninth Circuits (see App., *infra*, 12a, 16a (rejecting *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001), & *Bejjani*, 271 F.3d 670)), the Tenth Circuit held that Congress had not expressly provided that INA § 241(a)(5) applies only to aliens who reentered the United States after IIRIRA's effective date. App., *infra*, 16a. In so holding, the court sided with six other circuits—the First, Third, Fourth, Fifth, Eighth, and Eleventh, which it termed the "majority circuits" (App., *infra*, 12a)—that also "have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the temporal scope of INA § 241(a)(5)." App., *infra*, 12a-13a (citing *Sarmiento Cisneros* v. *United States Attorney General*, 381 F.3d 1277, 1280-1284 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 10-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 112-114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 297-299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 864-865 (8th Cir. 2002); & *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 105-108 (4th Cir. 2001)).[7]

Greene, 190 F.3d 1135, 1148 (10th Cir. 1999)). This additional step is designed to account for this Court's holding in *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997), that courts must use ordinary tools of statutory construction in analyzing the temporal scope of a statute. See App., *infra*, 11a n.7. However, this modification to the *Landgraf* two-step framework does not substantively change the retroactivity analysis; most courts merely subsume the statutory-construction question into step one of *Landgraf*. See, *e.g.*, *Bejjani*, 271 F.3d at 677; *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 801-802 (7th Cir. 2005).

[7] Two weeks after the Tenth Circuit's decision in this case, the Seventh Circuit also held that Congress did not expressly intend INA § 241(a)(5) to be prospective (see *Faiz-Mohammad*, 395 F.3d at 804), thus creating an 8-2 circuit split on this issue.

Having failed to find sufficient explicit evidence of congressional intent to stop with step one of *Landgraf*'s retroactivity analysis, the Tenth Circuit proceeded to step two of that analysis, under which a court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see also App., *infra*, 16a.[8]

The Tenth Circuit noted that a number of federal courts of appeals have "held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect." App., *infra*, 16a-17a & n.11 (citing *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14; & *Alvarez-Portillo*, 280 F.3d at 861). It distinguished two of those cases on the ground that the aliens in those cases had not only reentered the United States prior to IIRIRA's effective date, but had also filed applications for adjustment of status before that date. See App., *infra*, 17a-18a. The court acknowledged that in a third case—the Eighth Circuit's decision in *Alvarez-Portillo*—the alien had reentered the United States prior to IIRIRA's effective date but had not filed an adjustment application until after that date. It nonetheless distinguished *Alvarez-Portillo*, on the ground that, unlike here, the alien had not only reentered the United States prior to IIRIRA's effective date but had also married a United States citizen before that date. See App., *infra*, 17a n.11. The court concluded that

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[8] "If the statute ***would*** operate retroactively, [the] traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280 (emphasis added). No court has ever held that there is "clear congressional intent" that INA § 241(a)(5) apply retroactively. Thus, all courts would agree that if the statute has "retroactive effect" as applied to an alien who reentered the United States before April 1, 1997, it would not apply.

applying INA § 241(a)(5) to Mr. Fernandez would not give the statute retroactive effect because Mr. Fernandez had no "protectable expectation of being able to adjust his status" in that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." App., *infra*, 17a-18a.

As a result, the court held that INA § 241(a)(5) applied to Mr. Fernandez and barred his application for adjustment of status.[9]

REASONS FOR GRANTING THE PETITION

A. The Federal Courts Of Appeals Are Irreconcilably Split Over The Retroactivity Of INA § 241(a)(5).

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the question presented by this petition, and that this circuit split merits resolution. The ten federal courts of appeals that have analyzed INA § 241(a)(5) fall into three camps, raising distinct but interrelated circuit splits under each step of a *Landgraf* retroactivity analysis.

First, two courts—the Sixth and Ninth Circuits—have held that Congress did not intend the statute to apply to aliens who reentered the United States prior to the effective date of IIRIRA. See *Castro-Cortez*, 239 F.3d 1037; *Bejjani*, 271 F.3d 670. These courts have analyzed the question under the first stage of *Landgraf*, focusing on (a) the fact that the prior version of the statute (INA § 242(f) (1994)) was ***expressly*** retroactive but that Congress did not include such an express

[9] In the court of appeals petitioner argued that INA § 241(a)(5) would not preclude his petition for adjustment under INA § 245(i) even if the reinstatement statute were applicable to him. The court of appeals rejected this argument (see App., *infra*, 4a-9a), and petitioner does not challenge that determination in this Court.

retroactivity provision in INA § 241(a)(5); (b) the fact that earlier drafts of the provision of IIRIRA that became INA § 241(a)(5) ***were*** expressly retroactive, but that Congress removed that express-retroactivity clause prior to passing IIRIRA; (c) the fact that, unlike INA § 241(a)(5), ***other*** provisions in the final version of IIRIRA are expressly retroactive; and (d) the understanding that Congress, too, operates against the background assumption underlying *Landgraf* that absent a clear expression of congressional intent otherwise statutes should apply only prospectively. See *Castro-Cortez*, 239 F.3d at 1051-1052; *Bejjani*, 271 F.3d at 684-687.

Second, two courts—the court of appeals in this case and the Fourth Circuit in *Velasquez-Gabriel*, 263 F.3d 102—have held both that Congress did not expressly determine the retroactivity of INA § 241(a)(5) ***and*** that it would not give the statute "retroactive effect" to apply the statute to an alien who reentered the country prior to IIRIRA's effective date. See App., *infra*, 16a-18a; *Velasquez-Gabriel*, 263 F.3d at 107-110. Thus, these circuits have agreed with the government and held that the statute precludes such aliens from seeking any form of relief under the INA.

Finally, four federal courts of appeals have held that, although Congress did not expressly determine that INA § 241(a)(5) would apply only prospectively (under the first step of a *Landgraf* analysis), in at least certain circumstances application of the statute to an alien who had reentered the United States prior to IIRIRA's effective date would inappropriately give the statute "retroactive effect" under the second step of *Landgraf*. Although the Tenth Circuit sought to distinguish these cases on the ground that these aliens had done more than merely reentering the country before IIRIRA's effective date—in three instances, the aliens had also applied for an adjustment of status prior to that date,[10]

[10] See *Sarmiento Cisneros*, 381 F.3d at 1279; *Arevalo*, 344 F.3d at 6; *Faiz-Mohammad* 395 F.3d at 800. In each of these cases the

and in the fourth, the alien had married a United States citizen before that date[11]—these distinctions are meritless. In each instance, the conduct that Congress sought to deter in enacting INA § 241(a)(5)—illegally reentering the United States—happened before IIRIRA's effective date. See pages 21-22, *infra*.[12]

Thus, there can be no doubt that the federal courts of appeals are irreconcilably split over the applicability of INA § 241(a)(5) to cases such as this one. The courts have divided 8-2 on whether Congress explicitly intended the statute to apply only to aliens who reenter the United States after IIRIRA's effective date, and 4-2 on whether, assuming Con-

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courts rejected the government's argument that INA § 241(a)(5) applied and rendered the aliens "not eligible * * * for any relief" under the INA (INA § 241(a)(5)), instead holding that it would impermissibly give the statute retroactive effect under step two of a *Landgraf* analysis to apply the statute to these aliens. See *Sarmiento Cisneros*, 381 F.3d at 1283-1285; *Arevalo*, 344 F.3d at 14-15; *Faiz-Mohammad* 395 F.3d at 809-810.

[11] See *Alvarez-Portillo*, 280 F.3d at 861-862. Relying on *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), the Eighth Circuit held that it would impermissibly give INA § 241(a)(5) retroactive effect to apply that portion of the statute that precludes aliens from seeking other forms of relief under the INA to the alien. See 280 F.3d at 866-867.

[12] Two other courts have held that Congress did not expressly provide that INA § 241(a)(5) would apply only to aliens who reenter the United States after IIRIRA's effective date—thus creating an 8-2 split on that question. See *Avila-Macias*, 328 F.3d at 113-114; *Ojeda-Terrazas*, 290 F.3d at 299-300. However, these courts did not address the follow-up question whether it would give INA § 241(a)(5) retroactive effect to preclude an alien from seeking other forms of relief under the INA. See *Avila-Macias*, 328 F.3d at 114 (alien did not reenter the United States prior to IIRIRA's effective date); *Ojeda-Terrazas*, 290 F.3d at 300-302 (alien did not seek such relief).

gress did not have a discernable intent on that first question, applying the statute to aliens who reentered the United States prior to the effective date of IIRIRA would inappropriately give that statute retroactive effect. Only this Court can resolve this entrenched circuit split.

B. Review Is Also Warranted Because The Decision Below Is Clearly Incorrect And Stands The Presumption Of Retroactivity On Its Head.

This Court's review is necessary not only because the lower courts are irretrievably divided over the applicability of INA § 241(a)(5) to aliens who reentered the United States prior to IIRIRA's effective date but also because the court of appeals in this case plainly erred in analyzing that question—and in so doing, fundamentally misunderstood how courts should undertake the analysis mandated by step one of *Landgraf*. These errors have profound effects not only for cases addressing INA § 241(a)(5) but also for any other case in which a court is called on to determine the retroactive applicability of a federal statute, and thus warrant this Court's review.

1. The lower court relied on a non-existent presumption against prospectivity in its retroactivity analysis.

As discussed above, under *Landgraf* a "court's first task is to determine whether Congress has expressly prescribed [a] statute's proper reach." *Landgraf*, 511 U.S. at 280. The federal courts of appeals have split 8-2 on whether Congress expressly intended INA § 241(a)(5) to apply only to aliens who reentered the United States after IIRIRA's effective date. See pages 10-12, *supra*. This split alone would suffice to warrant Supreme Court review. Review is even more critical, however, because the courts that have held that Congress did not expressly intend that INA § 241(a)(5) should operate only prospectively have fundamentally misunderstood how a

court should analyze that question, and have effectively created a presumption ***against*** prospectivity.

a. As this Court explained in *Lindh*, courts must use the "normal rules" of statutory construction to determine whether "'Congress has expressly prescribed [a] statute's proper reach'" under the first step of *Landgraf*'s analysis of retroactivity. *Lindh*, 521 U.S. at 324-326 (quoting *Landgraf*, 511 U.S. at 280). Using these ordinary rules, it is evident that Congress intended INA § 241(a)(5) to apply only to aliens who reentered the United States after April 1, 1997. At least three factors lead to this conclusion:

First, the former reinstatement provision, INA § 242(f) (1994), which was enacted in 1952, specified that it was applicable to reentries "whether before or after June 27, 1952," the provision's effective date. See INA § 242(f) (1994); Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). Had Congress intended to apply IIRIRA's new reinstatement provision to reentries that occurred prior to its enactment, Congress could have simply updated the clear retroactivity language in the prior statute to reflect IIRIRA's effective date. Instead, Congress eliminated the retroactivity language entirely. This "provides strong support for the conclusion that [Congress] did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment." *Castro-Cortez*, 239 F.3d at 1051; see also *Bejjani*, 271 F.3d at 684.

Second, Congress "considered and ***rejected*** new language which would have applied the new reinstatement provision to illegal reentries which occurred before the date of enactment." *Bejjani*, 271 F.3d at 685 (emphasis added). In particular, "[b]oth the House and the Senate considered a version of the reinstatement provision which included [express] retroactive language." *Ibid.* As the *Bejjani* court noted, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *Ibid.* (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987)).

Finally, congressional silence with regard to the temporal scope of INA § 241(a)(5) speaks volumes when viewed in light of *Landgraf*'s default rule against retroactivity. As this Court explained in *Lindh*, the *Landgraf* decision put Congress on notice as to the "wisdom of being explicit" if it intended a provision to be retroactively applied. 521 U.S. at 328. Thus, "[n]otwithstanding whether a statute actually has an impermissibly retroactive effect, Congress is deemed to enact legislation with *Landgraf*'s 'default rule' in mind." *Castro-Cortez*, 239 F.3d at 1052. In enacting IIRIRA, Congress knew to be explicit when it intended for provisions of the statute to apply retroactively—several other sections of IIRIRA specifically indicate that those sections are to apply retroactively. See *id.* at 1051. Congress also must have known—or be deemed to have known—that its silence would mean that the new reinstatement provision would apply only prospectively. *Bejjani*, 271 F.3d at 686 ("The absence of an express directive from Congress, viewed in light of *Landgraf*'s default rule, persuades us to agree with *Castro-Cortez*, that in this case, 'congressional silence is instructive.'") (quoting *Castro-Cortez*, 239 F.3d at 1052).

Thus, using the ordinary tools of statutory construction, it is plain that Congress intended INA § 241(a)(5) to operate only prospectively to those aliens who reentered the United States after IIRIRA's effective date.

b. Even those courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) should operate only prospectively have acknowledged the force of the above arguments. For example, the Tenth Circuit in this case recognized that "Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospec-

tively." App., *infra*, 14a. Similarly, the Seventh Circuit observed that "[t]here is no question that some statutory evidence points to the conclusion reached by the Ninth and Sixth Circuits that Congress may not have desired [the reinstatement provision] to be applied retroactively." *Faiz-Mohammad*, 395 F.3d at 804.

The only reason these courts have nonetheless proceeded to the second step of the *Landgraf* analysis is that they have inappropriately stood the presumption of retroactivity on its head and effectively created a non-existent presumption against prospectivity. Rather than end their analysis with the implication of prospectivity derived from the normal rules of statutory construction, courts that disagree with the Sixth and Ninth Circuits, such as the court below, have held that "*Landgraf*'s first step is satisfied only where the 'statutory language [is] ***so clear*** that it could sustain ***only one interpretation***.'" *Ojeda-Terrazas*, 290 F.3d at 298 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 317 (2001)) (emphasis added). See also App., *infra*, 16a ("Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore ***unambiguously*** intended for the statute *not* to apply to these aliens) (second emphasis added); *Avila-Macias*, 328 F.3d at 113; *Alvarez-Portillo*, 280 F.3d 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Arevalo*, 344 F.3d at 11-12; *Sarmiento Cisneros*, 381 F.3d 128; *Faiz-Mohammad*, 395 F.3d at 803-804; *Velasquez-Gabriel*, 263 F.3d at 108.

This approach to analyzing whether Congress intended a statute to be exclusively prospective is fundamentally flawed, and warrants this Court's correction. The "only one interpretation" standard was articulated by this Court in *St. Cyr* in order to "'assure[] that Congress itself has affirmatively considered the potential unfairness of ***retroactive*** application and determined that it is an acceptable price to pay for the countervailing benefits.'" 533 U.S. at 316 (quoting *Landgraf*, 511 U.S. at 272-273) (emphasis added). Thus, this Court held that

"[a] statute may not be applied ***retroactively*** * * * absent a clear indication from Congress that it intended such a result." *Ibid.* (emphasis added); see also *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments * * * will not be construed to have retroactive effect unless their language requires this result.").

However, nothing in *St. Cyr* even remotely implies that Congress must speak unambiguously if it intends ***prospective*** application of a statute. There is no "potential unfairness" in such application and, thus, no need for courts to rely on any presumptions concerning congressional intent.[13] Indeed, this Court's decision in *Lindh* made clear that in order to apply a statute exclusively to future conduct, Congress need not speak with the same unambiguous clarity as it must when seeking to apply new legal rules retroactively.

In *Lindh*, this Court held that Congress intended chapter 153 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which deals with petitions for habeas corpus in non-capital state cases, to apply only prospectively to cases filed after AEDPA became effective. The Court observed that although AEDPA's chapter 153 contained no explicit statement regarding its temporal scope, Congress had explicitly provided that chapter 154, which deals with similar habeas claims in capital cases, "shall apply to cases pending on or after the date of enactment of this Act." 521 U.S. at 327. The Court explained that it "read [the provision] expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of ha-

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[13] See, *e.g.*, *Scott* v. *Boos*, 215 F.3d 940, 947-948 (9th Cir. 2000) ("A negative inference may be used to apply a statute prospectively because there is no traditional presumption against applying a statute prospectively. Concerns about retroactive effect are not relevant and there is no requirement that Congress clearly intended to have a statute apply prospectively.").

beas cases only when those cases had been filed after the date of the Act." *Ibid.*

Although the Court in *Lindh* was able to draw a negative inference from Congress's silence on the scope of chapter 153, the Court did not find that the statute was entirely clear on the subject. See *id.* at 332 (recognizing that although AEDPA "***does not speak to the present issue with flawless clarity***, we agree with Lindh that it tends to confirm the interpretation * * * that we adopt") (emphasis added). Indeed, the Court explained that the language proscribing the temporal scope of chapter 154 "may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way," but was sufficient to cause the Court to find that Congress intended Chapter 153 to apply only to cases filed after that provision became effective. *Id.* at 328-329. The Court also recognized that there were problems with its interpretation of the statute, but found that its analysis "accords more coherence" than any other possible interpretation. *Id.* at 336. "***That is enough.***" *Ibid.* (emphasis added).

By requiring an "unambiguous" directive from Congress that INA § 241(a)(5) be prospective only (App., *infra*, 16a)—and in so doing undermining the presumption against retroactivity—the so-called "majority circuits" have fundamentally misunderstood how a court should analyze the retroactivity of a statute under step one of *Landgraf*.[14] This error affects not only the interpretation of the temporal scope of INA § 241(a)(5), but also the interpretation of the temporal scope of every other federal statute. It plainly mandates this Court's correction.

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[14] Indeed, the analysis of these courts follows almost precisely the approach taken by the dissenting opinion in *Lindh*, which was not satisfied with the statutory interpretation performed by the Court and would have gone on to apply the second step of the *Landgraf* analysis. See *Lindh*, 521 U.S. at 341 (Rehnquist, J., dissenting).

2. Applying INA § 241(a)(5) to aliens who reentered the United States prior to the effective date of IIRIRA would give the statute an impermissible retroactive effect.

Even if the Tenth Circuit were right that it needed to reach the second step of a *Landgraf* retroactivity analysis, the lower court plainly erred in holding that applying INA § 241(a)(5) to aliens who reentered the United States prior to the effective date of IIRIRA—at least insofar as the statute precludes aliens from seeking other forms of relief authorized under the INA—would not give that statute impermissible retroactive effect.[15] As discussed above (at 11-12), this question, too, has split the federal courts of appeals, thus warranting this Court's attention. However, the lower court's exceedingly cramped interpretation of what matters for purposes of determining whether a statute has retroactive effect would warrant the Court's attention even were the lower courts not divided over it.

a. A statute has retroactive effect—and therefore cannot be applied to pre-enactment conduct absent clear congressional indication—when such application "would impair

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[15] If Congress expressly intended INA § 241(a)(5) to be prospective only, then ***no*** portion of that statute—including the portions that authorize the BICE to reinstate prior deportation orders and that preclude collateral attack on those prior deportation orders—would be applicable to aliens who reentered the United States prior to the effective date of IIRIRA. If, on the other hand, Congress had no discernible intent on the question whether INA § 241(a)(5) applies retroactively, then at least arguably those procedural aspects of the statute would apply to aliens who reentered prior to IIRIRA's effective date. See *Alvarez-Portillo*, 280 F.3d at 865-867 (differentiating between subprovisions of INA § 241(a)(5) for purposes of determining the statute's retroactive effect and holding that applying provision that precludes alien from seeking other forms of relief would give the statute impermissible retroactive effect).

rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. There can be no real doubt that applying INA § 241(a)(5) to aliens who reentered the United States before April 1, 1997, would give that statute an impermissible retroactive effect because the provision increases liability for the already completed act of illegal reentry.

As this Court has explained, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing ***possible*** deportation and facing ***certain*** deportation." *St. Cyr*, 533 U.S. at 325 (emphasis added); see also *Hughes Aircraft*, 520 U.S. at 949 (increase in likelihood of facing a *qui tam* action constitutes impermissible retroactive effect); *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937) ("[r]emoval of the possibility of a sentence of less than fifteen years * * * operates to [defendants'] detriment").

Prior to 1997, aliens who unlawfully reentered the United States "fac[ed] possible deportation" (*St. Cyr*, 533 U.S. at 325). In particular, although such aliens were subject to further removal—and in specific instances prior orders of removal could be reinstated (see INA § 242(f) (1994))—illegal reentry in no way precluded aliens from seeking various forms of relief from deportation, such as relief based on the alien's marriage to a United States citizen. In fact, "under this prior statutory regime for illegal reentry, [an alien's] marriage would have made him ***a likely candidate*** for adjustment of status to lawful permanent resident, though such relief was within the discretion of the Attorney General." *Alvarez-Portillo*, 280 F.3d at 862 (emphasis added).

By contrast, illegal aliens who reenter the country after April 1, 1997, "fac[e] certain deportation" (*St. Cyr*, 533 U.S. at 325). As the Seventh Circuit explained, IIRIRA's reinstatement provision "prevents aliens who previously have been deported from applying for discretionary relief. This

change constitutes a 'new disability' that did not exist prior to IIRIRA's passage." *Faiz-Mohammad*, 395 F.3d at 810; see also, *e.g.*, *Arevalo*, 344 F.3d at 15 ("Discarding [an alien's] application [as a result of INA § 241(a)(5)] would deprive her both of a right that she once had and of the reasonable expectation that she would have the opportunity to convince the Attorney General to grant her relief.").

Thus, the consequences for the illegal act of reentering the United States without inspection changed radically when INA § 241(a)(5) went into effect. Petitioner cannot now go back to 1982 and attempt to reenter the country lawfully. Yet, he faces consequences for that illegal reentry that he simply could not have anticipated at the time.

b. The Tenth Circuit rejected this argument by focusing on the date of petitioner's marriage and the date of his application for adjustment of status, rather than on the date of his illegal reentry into the United States. See App., *infra*, 17a-18a. The lower court's analysis is clearly erroneous. In determining whether a statute's application would have retroactive effect on prior conduct, courts must be mindful of the "relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring). "Absent clear statement otherwise, only such relevant activity which occurs ***after*** the effective date of the statute is covered." *Ibid.* (emphasis in original); see also *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999).

IIRIRA's reinstatement provision was not intended to regulate the ability of an illegal alien to marry a United States citizen; nor was it designed to alter the consequences of such a marriage. Rather, INA § 241(a)(5) was meant to serve as an additional disincentive for aliens who had previously been deported from reentering the country without inspection. This is obvious from the text of the statute, which delineates the consequences if an "an alien * * * ***reenter[s]*** the United States illegally after having been removed or having departed

voluntarily, under an order of removal" (*ibid.* (emphasis added)). Furthermore, the legislative history of INA § 241(a)(5) explains that Congress wanted to increase the adverse consequences of illegal reentry. See, *e.g.*, H.R. REP. NO. 104-469(I), at 155 (1996) ("the ability to cross into the United States over and over ***with no consequences*** undermines the credibility of our efforts to secure the border") (emphasis added).

Thus, the appropriate question is whether, in fact, INA § 241(a)(5) attaches increased liabilities to the completed act of illegally reentering the United States. See, *e.g.*, *Avila-Macias*, 328 F.3d at 114 (treating reentry as the "completed conduct" for retroactivity purposes). Because the consequences for reentry under the new reinstatement provision are substantially harsher than those prescribed by the statute in effect when Mr. Fernandez reentered the United States, and because no court has ever found that Congress clearly intended such retroactive applicability, INA § 241(a)(5) cannot be applied in this case.

* * * * *

The court of appeals plainly erred under both steps of a *Landgraf* retroactivity analysis in this case. Because those errors have broad implications not only for purposes of the analysis of INA § 241(a)(5) but also for how other courts will analyze the retroactivity of countless other statutes, these errors warrant this Court's review.

C. The Issue Here Is Of Substantial Practical Importance.

Assuming the Attorney General does not acquiesce to this petition for certiorari, we presume that he will argue that certiorari should be denied on the ground that the question presented will diminish in importance as time passes. There are several reasons why this counter-argument should be rejected.

For starters, the retroactive effect of INA § 241(a)(5) will continue to be debated and will continue to affect the lives of both aliens and their citizen relatives for many years to come. Although we know of no statistics about the number of illegal aliens who reentered the United States before April 1, 1997, after having been deported, that number is clearly immense. As of February 2001, less than four years after Congress enacted IIRIRA, the INS estimated that it had issued over 90,000 reinstatement orders under INA § 241(a)(5), approximately 57,000 of which fell within the jurisdiction of the Ninth Circuit. See Trina Realmuto, *Reinstatement of Removal Under INA § 241(a)(5)*, IMMIGRATION CURRENT AWARENESS NEWSLETTER, April 30, 2002, at nn.16-17 (citing Memorandum from Owen B. Cooper to Thomas Hussey, Director of the Office of Immigration Litigation, dated February 26, 2001). The issue presented here may arise in tens or even hundreds of thousands of future cases, as other undocumented aliens are found by BICE.

Furthermore, immigration law cries out for consistent application across the country. The fact that aliens who reside in certain circuits are able to apply for adjustment of status even if they reentered the United States before IIRIRA's effective date, whereas aliens in other circuits cannot, warrants this Court's intervention.

Finally, the Tenth Circuit's erroneous approach to analyzing whether Congress expressly intended INA § 241(a)(5) to apply only prospectively will affect the analysis of the retroactive effect of many future statutes. Because the lower court's analysis turns the presumption against retroactivity on its head and if allowed to stand may cause courts in the future inappropriately to find other statutes to be applicable retroactively, this Court's intervention is plainly called for.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Humberto FERNANDEZ-VARGAS,

Petitioner, No. 03-9610

v.

John ASHCROFT, Attorney General,

Respondent.[1]

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS
(BIA No. A-34-693-404)

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

McCONNELL, Circuit Judge.

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[1] The government correctly points out in its brief that the Attorney General is the only proper respondent in this case under 8 U.S.C. § 1252(b)(3)(a), and moves that the caption be amended to remove Tom Ridge, the Department of Homeland Security, and the Bureau of Immigration and Customs Enforcement, as parties. The government's motion is granted.

This case turns upon the application of two statutes.[2] The first statute is § 245(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(i), which allows an alien who entered the United States without inspection to apply to become an alien lawfully admitted for permanent residence, if a petition for classification under INA § 204, 8 U.S.C. § 1154, (including a relative visa petition) was filed on his or her behalf before April 30, 2001.[3]

The second statute is INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (referred to at times throughout as the "reinstatement statute"), which both (1) provides that a prior order of removal may be reinstated against an alien who has illegally re-entered the United States, and (2) bars that alien from applying for any form of "relief" under Chapter 12 of U.S.C. Title 8.[4] INA § 241(a)(5) replaced the former reinstatement provision, INA § 242(f), 8 U.S.C. § 1252(f) (repealed 1996), which, among other differences, did not prohibit application for relief.

The parties ask us to decide two questions regarding these statutes: (1) Is Petitioner Humberto Fernandez-Vargas' ("Fernandez") application to adjust status under INA § 245(i) an application for "relief" barred by the reinstatement stat-

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[2] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[3] We shall refer to the relevant statutory sections by both their INA and U.S.C. section numbers in the first instance and, thereafter, only by the INA section numbers.

[4] INA § 241(a)(5) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (IIRIRA), effective April 1, 1997. See IIRIRA § 309(a); *Arevalo v. Ashcroft*, 344 F.3d 1, 5 (1st Cir. 2003).

ute? (2) If so, is this bar impermissibly retroactive when applied to Fernandez, a previously deported immigrant who reentered the country prior to the reinstatement statute's April 1, 1997, effective date?

Because the plain language of the reinstatement statute bars application for any form of relief under Chapter 12 of U.S.C. Title 8, we hold that the reinstatement statute bars Fernandez' application to adjust status under INA § 245(i), 8 U.S.C. § 1255(i). Further, since both the filing of Fernandez' application to adjust status, and the marriage upon which his application is based, occurred *after* the effective date of the reinstatement statute, there is no impermissible retroactive effect. Therefore, Fernandez' petition for review is denied.

I. BACKGROUND

Fernandez, a native and citizen of Mexico, has been deported from the United States on several occasions. Shortly after his last deportation in October of 1981, Fernandez reentered the United States without inspection and has lived in this country ever since. On March 30, 2001, nearly four years after the April 1, 1997, effective date of the reinstatement statute, Fernandez married Rita Fernandez, a United States citizen and, on May 30, 2001, he filed both a Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal ("Form I-212"), and an application to adjust his status to that of a legal permanent resident.[5]

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[5] Fernandez also claims that his wife filed a relative visa petition for him at some point and that he was provided employment authorization due to his pending adjustment application, although there is nothing in the record to support these assertions. It does appear, however, that the government treated Fernandez' adjustment application as if a relative visa petition had been filed on his behalf prior to April 30, 2001, and the government does not dispute in its brief that such a petition was filed.

Thereafter, apparently at an interview regarding his application, Fernandez was arrested for being in the country illegally. The government reinstated the 1981 order of deportation and, on November 17, 2003, issued a warrant commanding that Fernandez be taken into custody and removed from the United States. Fernandez then filed his petition with this court, arguing his prior order of deportation could not be reinstated without a decision being made on his "pending" adjustment application.

In its brief, the United States claims that reinstatement of Fernandez' deportation order was proper in that Fernandez was barred from applying for adjustment of his immigration status. The government also claims that a decision was made on Fernandez' application and the administrative record does contain an unsigned and undated letter from U.S. Citizenship and Immigration Services ("USCIS"), a bureau of the Department of Homeland Security, purportedly denying Fernandez' application. One of the grounds for denial presented by the government in its letter was that INA § 241(a)(5) prohibited Fernandez from applying for or receiving relief. The letter also presented two other grounds for denying adjustment: (1) that Fernandez had sought admission to the United States by fraud or willful misrepresentation under INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C), and (2) that Fernandez was ineligible for admission under INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i), because he had been previously deported and twenty years had not passed since his last removal. In his brief, Fernandez questions whether this unsigned and undated denial letter was ever sent and claims he did not learn of the letter's existence until the production of the administrative record for review.

II. DISCUSSION

Fernandez seeks review of the government's reinstatement of his deportation order, arguing (1) that the bar to relief found in INA § 241(a)(5) does not prohibit his

application for adjustment of status under INA § 245(i), and (2) that if INA § 241(a)(5) *does* bar his application, the effect of the bar on him is impermissibly retroactive. As for the letter denying his application, Fernandez claims his inadmissibility under INA § 212(a)(6)(C) could have been waived because denial of adjustment will cause his spouse extreme hardship, but that he was prevented from applying for such a waiver by the reinstatement of the prior deportation order. He also claims that his inadmissibility under INA § 212(a)(9)(A)(i) would have been waived if his Form I-212 – which was not addressed in the denial – had been granted. He argues that the reinstatement order should be reversed and, essentially, that he should have the opportunity to have his application for adjustment ruled upon once he has had a chance to properly request waivers of the other possible grounds for denial. Even if, for the sake of argument, we assume Fernandez qualified for waivers of the grounds for denial found in INA § 212(a)(6)(C) and INA § 212(a)(9)(A)(i), and that he was prevented from properly applying for and receiving these waivers by the reinstatement of his prior order of deportation, we must still deny his petition because we hold that the reinstatement statute barred Fernandez' application to adjust his immigration status, and that the bar is not an impermissible retroactive effect on Fernandez.

A. Jurisdiction and Standard of Review

An order reinstating a prior removal order is the functional equivalent of a final order of removal and, therefore, we have jurisdiction to review the reinstatement order under INA § 242(b)(2), 8 U.S.C. § 1252(b)(2). *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063 (10th Cir. 2004); *Arevalo*, 344 F.3d at 2. Although we defer to an agency's interpretation of a statute when the statute is ambiguous, here there is no ambiguity and we are instead faced with purely legal questions, which we review de novo. *Lattab v. Ashcroft*, 384 F.3d 8, 14 (1st Cir. 2004); *Arevalo*, 344 F.3d at 9-10.

B. INA § 241(a)(5)'s Bar To Application For Relief

Fernandez' argument is that his INA § 245(i) application to adjust status was not barred by INA § 241(a)(5)'s bar to application and eligibility for "any relief." INA § 241(a)(5) reads:

> If the Attorney General finds that an alien has *reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal*, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, *the alien is not eligible and may not apply for any relief under this chapter*, and the alien shall be removed under the prior order at any time after the reentry.

INA § 241(a)(5) (emphasis added). INA § 245(i) provides that the Attorney General may adjust the status of an alien physically present in the United States who entered without inspection if the alien meets certain requirements, including being "admissible to the United States for permanent residence."

Generally, a previously removed alien who illegally reenters the United States is permanently inadmissible to the United States under INA § 212(a)(9)(C)(i)(II), and therefore not eligible for adjustment of status under INA § 245(i). See *Berrum-Garcia*, 390 F.3d at 1167 ("It is therefore apparent to us that Congress did not consider those who reenter the United States in defiance of a prior deportation order to be qualified for [INA § 245(i)'s] amnesty."). While a waiver of this permanent inadmissibility is available, that waiver may only be sought following the completion of an unwaivable ten-year period outside of the United States. INA § 212(a)(9)(C)(ii); *Berrum-Garcia*, 390 F.3d at 1166-1167. Consequently, we find no *inherent* tension between the allowance of adjustment of status to aliens admitted without inspection under INA § 245(i) and the bar to any relief to

previously removed aliens who illegally re-enter the United States under INA § 241(a)(5).

Fernandez cites *Prado Hernandez v. Reno*, 86 F.Supp.2d 1037 (W.D.Wash.1999), to support his argument that he should be allowed to adjust his status despite his previous removal order and subsequent illegal reentry. In *Prado Hernandez*, the district court held that an application to adjust status under INA § 245(i), submitted before reinstatement of the alien's previous deportation order, was not a "request for relief" barred by INA § 241(a)(5), and that the alien was entitled to have his adjustment application considered before the previous deportation order was reinstated.[6] *Id.* at 1041-42. The district court held that the adjustment application could not be considered a request for relief because, at the time it was filed, the INS had not yet moved to reinstate the prior deportation order and so there was no action from which to seek relief. *Id.* at 1041. The district court also treated the reinstatement as a new deportation, *id.* ("Prado-Hernandez applied for adjustment of status before any deportation proceedings had commenced."), and held that the fact that the alien might be deportable under the reinstatement statute did not make him ineligible for adjustment of status. *Id.* at 1041-42.

Here, like the alien in *Prado Hernandez*, Fernandez submitted his adjustment application prior to reinstatement. We are not persuaded by the decision in *Prado Hernandez* and decline to follow it in that the district court apparently ignored the fact that the alien was not deportable but *deported* and was ineligible for relief from that prior deportation under the reinstatement statute. As this court has recently stated: "Petitioner's argument that [INA § 241(a)(5)] poses no bar to

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[6] In *Prado-Hernandez*, the previously removed alien submitted a Form I-212 along with his adjustment of status application. The government granted the Form I-212 despite the fact that the alien had illegally re-entered the United States. *Id.* at 1038, 1041 n.3.

his efforts to obtain ... adjustment of status is refuted by the plain language of the statute." *Berrum-Garcia*, 390 F.3d at 1163. As recognized by the First Circuit in *Lattab*, the plain language of the statute bars "any relief," including adjustment of status under INA § 245(i):

> [the argument that INA § 241(a)(5)'s bar to relief does not apply to applications for adjustment filed before reinstatement of the order of deportation is] squarely foreclosed by the text of the statute. Section 241(a)(5) subjects an illegal reentrant to three independent consequences: reinstatement of the prior deportation order, ineligibility for any relief, and removal. Grammatically, section 241(a)(5) does not make ineligibility for relief dependent upon reinstatement of the prior deportation order. And even if it did, section 241(a)(5) expressly makes reinstatement retroactive to the date of the original deportation order.

Lattab, 384 F.3d at 16; *see also Flores v. Ashcroft*, 354 F.3d 727, 730-31 (8th Cir. 2003) (holding that INA § 241(a)(5) bars adjustment of status under INA § 245(i)); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 862 (8th Cir. 2002) (finding the argument that INA § 245(i) "conflicts with and supersedes" INA § 241(a)(5) to be without merit and rejecting it without discussion). The fact that Fernandez filed his application for adjustment of status prior to the reinstatement of his prior removal order does not help him.

> [INA § 241(a)(5)] states not only that an illegal reentrant "may not apply" for relief, but also that he is "not eligible" for relief. Once Petitioner's prior removal order has been reinstated, he no longer qualifies for any relief under the INA, regardless of whether his applications for relief were filed before or after the reinstatement decision is made. The timing of Petitioner's applications is simply immaterial.

Berrum-Garcia, 390 F.3d at 1163.

Further, Fernandez relied on INA § 245(i), as revised by the Legal Immigration Family Equity Act and the LIFE Act Amendments of 2000, in applying to adjust his status.[7] Congress' understanding that the reinstatement statute barred adjustment of status is clear from the Life Act Amendments, in which Congress expressly excluded certain classes of aliens from the bar of INA § 241(a)(5):

> In the same 2000 amendments that extended the application period for LIFE Act relief, Congress expressly excluded certain classes of aliens from the bar of [the reinstatement statute]. The amendments revised section 202 of the Nicaraguan Adjustment and Central American Relief Act and section 902(a) of the Haitian Refugee Immigration Fairness Act of 1998 to exempt aliens described in those acts who apply for adjustment of status from reinstatement pursuant to [the reinstatement statute]. In other words, when Congress intended to exempt certain groups of aliens from the sweep of the reinstatement statute, it knew how to do so.

Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir. 2003). Congress would not have specified that adjustment of status and waiver of " 'the grounds of inadmissibility under subparagraphs (A) and (C) of [INA § 212(a)(9)]' " were available to previously removed aliens in these specific classes, and that " 'the provisions of [INA § 241(a)(5) should] not apply' " to such aliens, if adjustment of status and waiver were available to all previously removed aliens. See *Berrum-Garcia*, 390 F.3d at 1167 (quoting Pub. Law No. 106- 554 App. D,

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[7] The Legal Immigration Family Equity Act or "LIFE Act", Pub. L. No. 106-553, 114 Stat. 2762A-143 through 149 (2000) and the LIFE Act Amendments of 2000, Pub. L. No 106-554, 114 Stat. 2763A-324 through 328 (2000).

§ 1505, 114 Stat. 2763A-326). Since Fernandez does not fall within the exempted classes of aliens, his application is barred by INA § 241(a)(5).

C. No Impermissible Retroactive Effect of INA § 241(a)(5).

Consequently, we must turn to Fernandez' argument that INA § 241(a)(5)' s bar of his application for adjustment is an impermissible retroactive effect of the revised reinstatement statute. Although, until now, we have not addressed the temporal scope of INA § 241(a)(5), it is clear that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1148 (10th Cir. 1999) ("The presumption against retroactivity remains the appropriate default rule.") (quotation omitted). While Congress has the power, within constitutional limits, to enact laws with retroactive effect, since there are inherent dangers in retroactive legislation, a statute may not be applied retroactively unless Congress clearly intended such a result. *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

The reinstatement statute differed from the previous statute in at least three ways.

> First, under the old regime only illegal reentrants who had previously been deported on certain specified grounds (e.g., conviction for an aggravated felony) were subject to having their original deportation orders reinstated. Under section 241(a)(5), however, all illegal reentrants now face the prospect of such reinstatement. Second, under the earlier system an alien had a right to a hearing, presided over by an immigration judge, before reinstatement of the prior deportation order became a fait accompli. Under the regulations implementing section 241(a)(5), however, there is no longer a right to such a hearing (or to any hearing, for that matter). Third, preexisting law allowed an illegal reentrant to attempt to fend off execution of a reinstated deportation order by petitioning for discretionary relief in the form of an adjustment of his status to that of an alien lawfully admitted for permanent residence. Conversely, section 241(a)(5) pretermits an illegal reentrant's ability to apply for any relief under the INA.

Lattab, 384 F.3d at 12-13 (citations omitted).

A three-step test governs the determination of whether INA § 241(a)(5) may be applied to bar Fernandez' adjustment application.

> First, the court must determine whether Congress has expressly prescribed [INA § 241(a)(5)'s] proper reach . . . . Second, if Congress has not expressly addressed the question, we employ the normal rules of statutory construction to ascertain the statute's temporal scope.... Finally, if the court cannot ascertain congressional intent, we consider whether the statute has a retroactive effect . . . . If a retroactive effect exists, it triggers the traditional judicial presumption against retroactivity and the new law will not be applied.

Jurado-Gutierrez, 190 F.3d at 1148 (quotations omitted).[8]

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[8] In *Landgraf*, the Supreme Court set forth a two-step retroactivity test: first, a court must determine whether congressional intent regarding temporal scope is evident from the statute; second, if congressional intent is not evident, the court must proceed to determine whether the new statute would have a retroactive effect. *Landgraf*, 511 U.S. at 280. The three-step retroactivity test set forth in *Jurado-Gutierrez* is a result of the Supreme Court's clarification in *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), that the

1. *Did Congress expressly prescribe INA § 241(a)(5)'s proper temporal reach?*

Here, INA § 241(a)(5) contains no explicit provision as to its proper temporal reach, and the normal rules of statutory construction must therefore be employed to attempt to ascertain congressional intent. *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 106 (4th Cir. 2001) ("Although § 241(a)(5) does not explicitly state whether it applies retroactively or prospectively, the [parties] each contend that Congress unambiguously defined the statute's temporal application.").

2. *Can congressional intent regarding INA § 241(a)(5)'s proper temporal reach be determined by application of the rules of statutory construction?*

A number of our sister circuits have considered whether application of the rules of statutory construction reveals an unambiguous congressional intent as to the INA § 241(a)(5)'s temporal scope, and have reached differing conclusions.

On one hand, the Ninth and Sixth Circuits, applying the normal rules of statutory construction, determined that Congress unambiguously intended for INA § 241(a)(5) to be applied only to previously deported aliens who re-entered the country after the effective date of the statute. *Castro-Cortez v. INS*, 239 F.3d 1037, 1050-53 (9th Cir. 2001) ("[Section 241(a)(5)] applies only to aliens who re-enter the United States after IIRIRA's effective date."); *Bejjani v. INS*, 271 F.3d 670, 676-77 (6th Cir. 2001) (same).

On the other hand, the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits ("majority circuits") have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the

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normal rules of statutory construction apply to the determination that must be made under the first step of the *Landgraf* test.

temporal scope of INA § 241(a)(5). *Sarmiento Cisneros v. United States Attorney Gen.*, 381 F.3d 1277, 1283 (11th Cir. 2004); *Arevalo*, 344 F.3d at 12-13; *Avila-Macias v. Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 299 (5th Cir. 2002); *Alvarez-Portillo*, 280 F.3d at 865; *Velasquez-Gabriel*, 263 F.3d at 108.

Fernandez cites to *Castro-Cortez* and *Bejjani* as support for his argument that INA § 241(a)(5) should not bar his application because his last illegal entry into the United States occurred in 1981, well before the reinstatement statute's effective date. He does not, however, address the refutation of the holdings in those cases by the majority of the circuits.

In *Castro-Cortez*, the Ninth Circuit relied on three arguments in reaching its holding:

> First, the court noted that Congress eliminated the retroactivity language from the statute and stated that "Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment." Second, the court concluded, by negative implication, that, because Congress had specified in several other sections of the IIRIRA whether the section would apply retroactively, the failure to provide for retroactive application in [INA § 241(a)(5)] indicated that Congress did not intend for that section to apply retroactively. Third, the court stated that "Congress is deemed to enact legislation with *Landgraf*'s 'default rule' [against retroactivity] in mind . . . . Accordingly, silence provides useful evidence as to intent for the first step of *Landgraf*'s two-part inquiry."

Sarmiento Cisneros, 381 F.3d at 1282 (quotations omitted); *accord Castro-Cortez*, 239 F.3d at 1051-52. The Sixth Cir-

cuit relied on much the same arguments in reaching its holding in *Bejjani*, noting further that Congress did not simply remove the previous retroactivity language, it specifically rejected drafts of the new statute that included such language. *See Bejjani*, 271 F.3d at 684-87. But the Sixth Circuit also found the Ninth Circuit's negative implication argument to be unpersuasive. *Id.*

The majority circuits have disagreed with the reasoning of the Ninth and Sixth Circuits, generally finding that: (1) while Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospectively, the silence that replaced that retroactivity language cannot be considered a clear statement of congressional intent;[9] (2) no negative implication may be drawn from the fact that some sections of IIRIRA require application to pre-enactment conduct, when other IIRIRA sections prohibit application to pre-enactment conduct,[10] and (3) although Congress is deemed to act with the *Landgraf* "default rule" in mind, an equally valid conclusion is that Congress remained silent in expectation that the courts would proceed to determine, on a case-by-case basis, whether the statute would have an impermissible retroactive effect.[11]

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[9] *Sarmiento Cisneros*, 381 F.3d at 1282; *Avila-Macias*, 328 F.3d at 113.

[10] *Sarmiento Cisneros*, 381 F.3d at 1282 ("The sometimes retrospective, sometimes prospective provisions that surround the statute unveil the Janus-like faces of Congress, but leave its mind concealed." (quotation omitted)); *Arevalo*, 344 F.3d at 13 (considering the sometimes retrospective, sometimes prospective provisions, "the negative implication argument could just as easily run in the other direction"); *Avila-Macias*, 328 F.3d at 113; *Velasquez-Gabriel*, 263 F.3d at 107.

[11] *Sarmiento Cisneros*, 381 F.3d at 1282-83; *Arevalo*, 344 F.3d at 12 ("Although Congress is presumed to be aware of the law's general aversion to retroactivity . . . it must also be presumed to know that some *Landgraf* inquiries come out the other way." (internal citation omitted)); *Avila-Macias*, 328 F.3d at 114.

The majority circuits' findings must be considered alongside the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the Supreme Court considered the retroactive effect of the replacement of former INA § 212(c) (giving the Attorney General broad discretion to waive deportation orders of resident aliens) with IIRIRA § 304(b) (removing aliens convicted of aggravated felonies from the class of aliens eligible for waiver). *St. Cyr*, 533 U.S. at 297. The government argued that application of the rules of statutory construction revealed Congress's unambiguous intent that IIRIRA § 304(b) was to apply to all removals following the statute's effective date. *Id.* at 315. Specifically, the government argued that: (1) IIRIRA was so comprehensive a statute that Congress must have intended that "the provisions of the old law should no longer be applied at all"; (2) that the effective date of the statute is, in and of itself, an indicator that Congress intended the statute to be applied retroactively; and (3) that the "saving provision" in IIRIRA § 309(c)(1) – which states the amendments were not to apply to proceedings that began before the effective date – implies that the amendments were to apply to all proceedings commenced after the effective date. *Id.* at 317-18 (quotation omitted).

The Supreme Court, after noting that "[c]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation[,]" *id.* at 316-17, went on to hold that none of the arguments set forth by the government were sufficient reason to find unambiguous congressional intent regarding the section's temporal scope, especially when Congress unambiguously indicated its intent as to temporal scope in *other* sections of IIRIRA. *Id.* at 317-20; *see also Ojeda-Terrazas*, 290 F.3d at 299-300

("Congress' clear statement in other IIRIRA provisions that those provisions applied retroactively, the effective date of the statute, and the inclusion of the saving provision did not make Congress' statement sufficiently clear to satisfy *Landgraf*'s first step.").

In light of the Supreme Court's holding in *St. Cyr*, we agree with the reasoning of the majority circuits and join them in holding that Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore unambiguously intended for the statute *not* to apply to these aliens. Consequently, we must determine whether INA § 241(a)(5)'s bar of Fernandez' adjustment application is an impermissible retroactive effect of that statute.

3. *Would the application of INA § 241(a)(5) have an impermissible retroactive effect in this case?*

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Sarmiento Cisneros*, 381 F.3d at 1282 (quotation omitted). "A provision has a retroactive effect if it, for example, 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " *Jurado-Gutierrez*, 190 F.3d at 1148 (quoting *Landgraf*, 511 U.S. at 280). In this case, the enactment of INA § 241(a)(5) did not attach new legal consequences to events previously completed.

We recognize that a number of cases have held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect where the adjustment application was filed before the effective date of IIRIRA. *See Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14 ("[A]pplications for discretionary relief, once made, often

become a source of expectation and even reliance.").[12] In this case, since Fernandez' marriage and the filing of his adjustment application did not occur until 2001, the only event completed before April 1, 1997, was his illegal re-entry into the United States. In other words, on the day the reinstatement statute came into effect, Fernandez had no protectable expectation of being able to adjust his status. It would be a step too far to hold that simply by re-entering the country, Fernandez created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal. "Inchoate plans to act in the future, even when made in anticipation of the legal consequences of those future actions, do not convey the type of settled expectation that retroactivity analysis seeks to protect." *Lattab*, 384 F.3d at 16 (holding that a plan to marry a United States' citizen and then apply for adjustment of status was not a settled expectation). As with the alien in *Lattab*: "[w]hile section 241(a)(5) barred [Fernandez] from applying for any affirma-

[12] Further, in *Alvarez-Portillo*, the Eighth Circuit held INA § 241(a)(5)'s bar had an impermissible retroactive effect when applied to an alien who had both re-entered the United States and married a United States citizen prior to April 1, 1997, notwithstanding the fact that his adjustment application was not filed until 2001. *Alvarez-Portillo*, 280 F.3d at 861. The Eighth Circuit held that, at the time Alvarez-Portillo was *married*, "long-standing INS practice created a reasonable expectation that he could defend against later deportation or removal by seeking a discretionary adjustment of status to lawful permanent resident[,]" and the elimination of this defense, without more, was an attachment of a new legal consequence to events completed before the enactment of IIRIRA. *Id.* at 867; *see also Lopez-Flores v. Dep't of Homeland Sec.*, 387 F.3d 773, 775-76 (8th Cir. 2004) (holding reinstatement had impermissible retroactive effect when alien had re-entered U.S. *and* employer had filed an application for work authorization *before* effective date of IIRIRA). Without expressing an opinion as to the correctness of the decision reached in *Alvarez-Portillo*, we note Fernandez' marriage did not occur until 2001.

tive relief (such as an adjustment of status) from and after April 1, 1997, that change was inconsequential because there was no relief for which [he] could then have qualified." *Id.* at 15.

III. CONCLUSION

Because we find (1) that INA § 241(a)(5) bars an application for adjustment of status under INA § 245(i), and (2) that such a bar is not an impermissible retroactive effect of INA § 241(a)(5) when applied to Fernandez, the petition for review is DENIED.

APPENDIX B

U.S. Department of Justice
Immigration and Naturalization Service **Warrant of Removal/Deportation**

File No: A34 693 404
Date: 11/17/2003

To any officer of the United States Immigration and Naturalization Service:

FERNANDEZ-Vargas, Humberto
(Full name of alien)

who entered the United States at El Paso, TX on
(Place of entry)

January 1982
(Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation or removal proceedings
- ☒ a district director or a district director's designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 241(a)(5).

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction,

command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

Salaries and Expenses, U.S. Immigration and Customs Enforcement, FY2004, to include an attendant if necessary.

/s/ Timothy T. Nay
(Signature of INS official)

SDDO
(Title of INS official)

11/17/2003 Salt Lake City, UT
(Date and office location)

Form I-205 (Rev. 4-1-97) N

To be completed by Service officer executing the warrant:
Name of alien being removed:

FERNANDEZ-Vargas, Humberto

Port, date, and manner of removal: _____

Photograph of alien removed

Right index fingerprint of alien removed

_____
(Signature of alien being fingerprinted)

_____
(Signature and title of INS official taking print)

Departure witnessed by: _____
(Signature and title of INS official)

If actual departure is not witnessed, fully identify source or means of verification of departure:

_____

_____

_____

If self-removal (self-deportation), pursuant to 8 CPR 241.7, check here. ☐

Departure Verified by: _____
(Signature and title of INS official)

Form I-205 (Rev. 4-1-97) N

U.S. Department of Justice
Immigration and Naturalization Service

Warning to Alien Ordered Removed or Deported

File No: A34 693 404
Date: _____

Alien's full name: FERNANDEZ-Vargas, Humberto

In accordance with the provisions of section 212(a)(9) of the Immigration and Nationality Act (Act), you are prohibited from entering, attempting to enter, or being in the United States:

☐ For a period of 5 years from the date of your departure from the United States because you have been found deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated upon your arrival in the United States as a returning lawful permanent resident.

☐ For a period of 10 years from the date of your departure from the United States because you have been found:

- ☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.
- ☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated as a result of your having been present in the United States without admission or parole.
- ☐ deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in accordance with section 238 of the Act by a judge of a United States district court, or a magistrate of a United States magistrate court.

☒ For a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported, or removed from the United States, you have been found:

☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in proceedings under section 238 of the Act.

☐ deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☒ to have reentered the United States illegally and have had the prior order reinstated under section 241(a)(5) of the Act.

☐ At any time because you have been found inadmissible or excludable under section 212 of the Act, or deportable under section 241 or 237 of the Act, and ordered deported or removed from the United States, and you have been convicted of a crime designated as an aggravated felony.

After your removal has been effected you must request and obtain permission from the Attorney General to reapply for admission to the United States during the period indicated.

You must obtain such permission before commencing your travel to the United States. Application forms for requesting permission to reapply for admission may be obtained by contacting any United States Consulate or office of the Immigration and Naturalization Service. Refer to the above file number when requesting forms or information.

WARNING: Title 8 United States Code, Section 1326 provides that it is a crime for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States without the Attorney General's express consent. Any alien who violates this section of law is subject to prosecution for a felony. Depending on the circumstances of the removal, conviction could result in a sentence of imprisonment for a period of from 2 to 20 years and/or a fine of up to $250,000.

_____	_____	_____
(Signature of officer serving warning)	(Title of Officer)	(Location of INS office)

Form I-294 (Rev. 6-1-97)N

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Intent/Decision to Reinstate Prior Order

File No: A34 693 404
Date: 11/7/03

Alien's full name: FERNANDEZ-Vargas, Humberto

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Attorney General intends to reinstate the order of Deportation entered against you. This intent is based on the following determinations:

1. You are an alien subject to a prior order of Deportation entered on December 01, 1981 at Denver, Colorado.

2. You have been identified as an alien who:

☒ was removed on December 02, 1981 pursuant to an Order of Deportation.

☐ departed voluntarily on pursuant to an order of Deportation on or after the date on which such order took effect.

3. You illegally reentered the United States on or about January, 1982 at or near El Paso, Texas.

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may consent this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement con-

testing this determination, were communicated to the alien in the Spanish language.

Ray Sanchez Jr
(Printed or typed name of official)

/s/ Ray Sanchez Jr
(Signature of officer)

Special Agent
(Title of officer)

Acknowledgement and Response

I ☒ do ☐ do not wish to make a statement contesting this determination.

11-7-03	/s/ Humberto Fernandez
(Date)	(Signature of Alien)

Decision, Order, and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

11-7-03	/s/ Jonathan L. Lines
(Date)	(Signature of authorized deciding INS official)
Jonathan L. Lines	Interim Resident Agent in Charge
(Printed or typed name of official)	(Title)

Form I-871 (Rev. 6-5-97)

[SEAL] **U.S. Department of Justice**

Immigration and Naturalization Service

Denver District-Salt Lake City Sub-Office *5272 South College Drive #100*
Salt Lake City, Utah 84123

November 7, 2003

MEMORANDUM FOR File A 34 693 404

FROM: Jonathan L. Lines
Interim Resident Agent in Charge
Salt Lake City, Utah

SUBJECT: Reinstatement of Final Order – Memorandum of Facts

Per INS Section 241(a)(5) it is so ordered that the reinstatement of a final order be executed upon the following alien – FERNANDEZ-Vargas, Humberto.

SUBJECT was previously removed from the United States under a final order or who departed while under a final order, the issuance of said final order was dated December 01, 1981 with the location being Denver, Colorado.

There is no indication in file A34 693 404 that SUBJECT has ever had permission to reapply for admission to the United States after being removed/deported/excluded.

SUBJECT is to be issued a new Warrant of Removal, Form I-205, pursuant to Section 241(a)(5) of the Act.

Form G-2

FILED
SEP 27 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 8 U.S.C. 1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally re-entered the United States, applies to an alien whose illegal re-entry predated the effective date of the provision.

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In the Supreme Court of the United States

No. 04-1376

HUMBERTO FERNANDEZ-VARGAS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the reinstatement of a previous order of deportation pursuant to 8 U.S.C. 1231(a)(5), which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-599. Before IIRIRA was enacted, former

8 U.S.C. 1252(f) (1994) governed the reinstatement of a previous deportation order. That provision stated:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C. 1252(f) (1994).

IIRIRA repealed that provision and replaced it with 8 U.S.C. 1231(a)(5). The current provision states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5). Because the current provision prescribes that an alien who illegally re-enters the United

States after having been removed is "not eligible and may not apply for any relief," such an alien is ineligible and may not apply for, *inter alia*, adjustment of status to that of lawful permanent resident. See 8 U.S.C. 1255(i). Under the previous reinstatement provision, by contrast, an alien who illegally re-entered the United States after having been removed was permitted to petition for discretionary relief from removal, including an application for adjustment of status. See Pet. App. 10a-11a; *Lattab* v. *Ashcroft*, 384 F.3d 8, 12-13 (1st Cir. 2004).[1]

2. Petitioner, a citizen of Mexico, was deported from the United States on several occasions, including in October 1981. In January 1982, petitioner re-entered the United States without inspection. On April 1, 1997, the new reinstatement provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), became effective. Pet. App. 3a, 19a; Gov't C.A. Br. 6; see IIRIRA § 309(a), 110 Stat. 3009-625.

On March 30, 2001, nearly four years after IIRIRA's effective date, petitioner married a United States citizen. On May 30, 2001, petitioner filed an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). Petitioner also filed an application to adjust his status to

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[1] The operation of the current reinstatement provision differs from that of the former provision in two additional ways. See *Lattab*, 384 F.3d at 12-13. First, while the former provision reinstated the deportation orders of only a certain category of illegal re-entrants (*i.e.*, those whose deportation orders were grounded in former 8 U.S.C. 1252(e) (1994)), the current provision reinstates the previous removal orders of all illegal re-entrants. Second, while an alien had a right to a hearing before an immigration judge under the former provision, an alien has no right to such a hearing under the regulations implementing the current provision. See 8 C.F.R. 241.8.

that of lawful permanent resident based on a relative visa petition filed on his behalf by his wife. See 8 U.S.C. 1255(i). On November 7, 2003, the Department of Homeland Security (DHS) issued a notice of its intent to reinstate petitioner's previous deportation order pursuant to 8 U.S.C. 1231(a)(5) on the basis that petitioner illegally re-entered the United States after having been removed. On November 17, 2003, DHS issued an order reinstating petitioner's previous deportation order pursuant to Section 1231(a)(5), and also issued a warrant for petitioner's arrest and removal. Pet. App. 3a-4a, 19a-28a; Gov't C.A. Br. 6-7.

3. Petitioner sought review in the court of appeals of the reinstatement of his previous deportation order. He argued that, because he had illegally re-entered the country before IIRIRA's effective date, the application against him of the current reinstatement provision, 8 U.S.C. 1231(a)(5), would be impermissibly retroactive. Petitioner contended that he therefore was subject to the previous reinstatement provision, 8 U.S.C. 1252(f) (1994), and that he retains eligibility under that provision to apply for adjustment of status. The government argued in response that application of the current reinstatement provision to petitioner does not have a retroactive effect, and that the current provision renders petitioner ineligible to apply for adjustment of status. Pet. App. 4a-5a; Gov't C.A. Br. 10-16.[2]

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[2] The government also argued that petitioner's application for adjustment of status had been denied in an unsigned and undated letter from DHS. The letter denied adjustment of status on three grounds: (i) the current reinstatement provision, 8 U.S.C. 1231(a)(5), renders petitioner ineligible to apply for adjustment of status; (ii) petitioner had sought admission through fraud or willful misrepresentation, see 8 U.S.C. 1182(a)(6)(C); and (iii) petitioner was ineligible for admission

The court of appeals denied the petition for review, holding that application of Section 1231(a)(5) to petitioner does not produce a retroactive effect. Pet. App. 1a-18a.[3] The court explained that the threshold question was whether Congress had prescribed the temporal reach of Section 1231(a)(5). See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). The court observed that the courts of appeals had reached conflicting conclusions on the issue. Pet. App. 12a-13a. While two courts of appeals had concluded that Congress made clear in the statute that Section 1231(a)(5) applies only to aliens who illegally re-enter the United States after IIRIRA's effective date, *id.* at 12a (citing *Bejjani* v. *INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez* v. *INS*, 239 F.3d 1037, 1050-1053 (9th Cir. 2001)), six courts of appeals had concluded that the statute contains no clear indication concerning its temporal reach, *id.* at 12a-13a (citing *Sarmiento Cisneros* v. *United States Att'y Gen.*, 381 F.3d 1277, 1283-1285 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 12-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 865 (8th Cir.

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because twenty years had not elapsed since his last removal, see 8 U.S.C. 1182(a)(9)(A)(i). Petitioner alleged that he did not learn of that letter until the production of the administrative record for review, and he further contended that the latter two grounds for denying relief were subject to waiver. The court of appeals did not rest its decision on the letter or consider the letter in its analysis, see Pet. App. 4a-5a, and the government does not rely on the letter in this Court.

[3] Before addressing the retroactivity question, the court initially explained that, insofar as Section 1231(a)(5) applies to petitioner, the provision renders petitioner ineligible to apply for an adjustment of status. Pet. App. 6a-10a. Petitioner does not challenge that conclusion in this Court. Pet. 10 n.9.

2002); *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 108 (4th Cir. 2001)).[4] The court of appeals agreed with the majority of courts of appeals and held that Congress did not evince an unambiguous intent concerning the temporal scope of Section 1231(a)(5). Pet. App. 14a-16a.

The court then turned to the second step of the inquiry under this Court's retroactivity decisions, and addressed whether application of Section 1231(a)(5) would have a "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The court concluded that Section 1231(a)(5) worked no retroactive effect in this case. The court recognized that certain courts of appeals had found that Section 1231(a)(5) would have a retroactive effect in the case of an alien who had applied for adjustment of status before IIRIRA's effective date or at least had become married to a United States citizen before that date. Pet. App. 16a-17a & n.12. The court explained, however, that petitioner had neither applied for adjustment of status nor become married by IIRIRA's effective date. *Id.* at 17a.

The court concluded that, in those circumstances, petitioner "had no protectable expectation of being able to adjust his status." Pet. App. 17a. The court reasoned that it "would be a step too far to hold that simply by reentering the country, [he] created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal." *Ibid.*

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[4] The Seventh Circuit has since agreed with the majority of the courts of appeals and has held that Congress did not clearly prescribe the temporal reach of Section 1231(a)(5). See *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799 (7th Cir. 2005).

Because petitioner had not applied for (and was not eligible for) adjustment of status by the time of IIRIRA's effective date, the court of appeals held that application of Section 1231(a)(5) in this case did not have a retroactive effect. *Id.* at 17a-18a. The court therefore ruled that petitioner was subject to Section 1231(a)(5).[5]

DISCUSSION

The courts of appeals disagree on the applicability of the current reinstatement provision, 8 U.S.C. 1231(a)(5), to an alien who had illegally re-entered the United States before IIRIRA's effective date of April 1, 1997. In light of that disagreement, and because the issue is an important and recurring one, the government does not oppose the granting of the petition for a writ of certiorari.

1. This Court's decisions prescribe a two-step framework for addressing whether a statute should be applied to factual circumstances that predate the statute's enactment. The first question is whether Congress has prescribed the temporal reach of the statute by mandating that the statute should apply (or not apply) to particular conduct before a specified date. See *Martin* v. *Hadix*, 527 U.S. 343, 352 (1999); *Landgraf*, 511 U.S. at 280. If the threshold inquiry reveals that "there is no congressional directive on the temporal reach of [the] statute," the inquiry turns to the second step, which entails a determination "whether the application of the statute to the conduct at issue would result in a retroactive effect." *Martin*, 527 U.S. at 352; see *Landgraf*, 511 U.S. at 280.

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[5] Petitioner was removed to Mexico while the case was pending in the court of appeals. Pet. 7. His removal does not moot the proceedings. See *Bejjani*, 271 F.3d at 688-689.

The analysis at the second step of "whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270); see *INS* v. *St. Cyr*, 533 U.S. 289, 321-324 (2001). That determination turns on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin*, 527 U.S. at 358. If application of the statute in the circumstances at issue would produce a "retroactive effect," the Court "presume[s] that the statute does not apply" in those circumstances, in "keeping with [its] 'traditional presumption' against retroactivity." *Id.* at 343 (quoting *Landgraf*, 511 U.S. at 280).

a. The courts of appeals disagree on whether, under the first step of the retroactivity inquiry, Congress prescribed the applicability of Section 1231(a)(5) to an alien whose illegal re-entry predated the provision's effective date. The Sixth and Ninth Circuits have concluded that Congress mandated with requisite clarity that Section 1231(a)(5) does not apply to an alien who illegally reentered the United States before IIRIRA's effective date. *Bejjani*, 271 F.3d at 676-687 (6th Cir.); *Castro-Cortez*, 239 F.3d at 1050-1053 (9th Cir.). Those two courts therefore have had no occasion to proceed to the second step of the inquiry to assess whether application of Section 1231(a)(5) to an alien who illegally re-entered the United States before IIRIRA's effective date would entail a retroactive effect. Eight courts of appeals (including the court below) have disagreed with the Sixth and Ninth Circuits on that initial question, and have held that Congress did not prescribe the temporal reach of Section 1231(a)(5). See Pet. App. 12a-13a (citing deci-

sions from the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits); *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 804 (7th Cir. 2005). Those courts therefore have proceeded to an assessment whether the application of Section 1231(a)(5) in the particular circumstances would have a retroactive effect.

b. Petitioner argues (Pet. 13-18) that Congress prescribed the temporal reach of Section 1231(a)(5) and mandated that the provision have no application to aliens whose illegal re-entry predated IIRIRA's effective date. The court of appeals below, consistent with the majority of the courts of appeals, correctly rejected that argument.

The text of Section 1231(a)(5) contains no indication of an intent to foreclose its application to aliens who had illegally re-entered the United States before IIRIRA's effective date. To the contrary, Section 1231(a)(5) provides by its terms for reinstatement of a previous removal order whenever "the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily." 8 U.S.C. 1231(a)(5). The triggering event under the provision thus is not the illegal re-entry itself, but a finding by the Attorney General that the alien has illegally reentered the country after having been removed; and the purpose of the provision is to streamline the process for dealing with the consequence of that finding (*viz.*, removing the alien by reinstating the previous removal order in the event of such a finding).

Section 1231(a)(5) therefore governs the reinstatement of a previous removal order in the case of an alien who is found to have illegally re-entered the country, and its aim is thus to expedite the removal of the alien. See *Martin*, 527 U.S. at 363 (Scalia, J., concurring in

part and concurring in the judgment) (observing that identification of relevant "reference point[ ] for the retroactivity determination" should "turn upon which activity the statute was intended to regulate"). See also *Republic of Austria* v. *Altmann*, 541 U.S. 677, 697 (2004) (finding that Foreign Sovereign Immunities Act applies to actions arising from pre-enactment conduct because relevant conduct regulated by Act is present assertion of immunity rather than past conduct giving rise to action). Section 1231(a)(5) does not centrally aim to regulate the illegal re-entry itself. Compare 8 U.S.C. 1326 (establishing crime of illegal re-entry following previous removal). Section 1231(a)(5) contains no suggestion that the applicability of its rules for reinstatement of a previous removal order might turn on the timing of the re-entry. Rather, it provides generally for reinstatement of a previous removal order upon a finding "that an alien *has reentered* the United States illegally," without indicating any distinction based on when that re-entry occurred. 8 U.S.C. 1231(a)(5) (emphasis added).

Petitioner does not focus on what Section 1231(a)(5) affirmatively says. He instead argues that Congress prescribed Section 1231(a)(5)'s temporal reach by negative implication. See Pet. 14-15. Petitioner relies on the language of the former reinstatement provision, 8 U.S.C. 1252(f) (1994), which was enacted in 1952 as part of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163. Petitioner notes that the former provision allowed for reinstatement of a previous deportation order if the Attorney General should "find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after June 27, 1952* [the date of the INA's enactment], on any ground

described in any of the paragraphs enumerated in subsection (e)." 8 U.S.C. 1252(f) (1994) (emphasis added). In petitioner's view, by excluding comparable "before or after" language from Section 1231(a)(5), Congress indicated by negative implication its intention that the provision should not apply to an alien whose illegal re-entry predated the provision's effective date. As explained by the court below and other courts of appeals, however, "the silence that replaced [the 'before or after' language] cannot be considered a clear statement of congressional intent." Pet. App. 14a; see *Faiz-Mohammad*, 395 F.3d at 803-804; *Sarmiento Cisneros*, 381 F.3d at 1282; *Avila-Macias*, 328 F.3d at 113.

That is especially true because petitioner's argument rests on the flawed assumption (Pet. 14) that the phrase, "before or after June 27, 1952," in the previous reinstatement provision concerned the date of the alien's illegal re-entry rather than the date of the alien's previous "order of deportation" or the date that the alien "previously departed or [was] deported" pursuant to that order. 8 U.S.C. 1252(f) (1994). Because the "before or after" language immediately followed the reference to the alien's "having previously departed or been deported pursuant to an order of deportation," the most natural reading is that the "before or after" language pertained to the date that the alien departed or was deported or to the date of the previous deportation order. That conclusion is reinforced by the fact that the language that immediately followed the "before or after" language addressed the grounds for the previous deportation, *i.e.*, "on any ground described in any of the paragraphs enumerated in subsection (e) of this section." Because the "before or after" language in the previous reinstatement provision concerned the date of the alien's

deportation or departure or the date of the previous deportation order—rather than the date of the alien's illegal re-entry—the absence of parallel language in Section 1231(a)(5) scarcely suggests that Congress intended to draw a distinction based on the timing of an illegal re-entry.[6]

Petitioner also contends (Pet. 15) that, when considered in light of the presumption against retroactivity, Congress's failure to state explicitly that Section 1231(a)(5) applies to aliens whose illegal re-entry predated the statute's effective date itself indicates an intent that the provision should not apply in those circumstances. That argument rests on a fundamental misconception about the presumption against retroactivity.

The presumption by nature assumes significance only if the statute's application in the circumstances would produce a "retroactive effect." See, *e.g.*, *Martin*, 527 U.S. at 352. As this Court has made clear, a "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted). Rather, the "conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the

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[6] Petitioner similarly relies (Pet. 14-15) on the fact that certain versions of the new reinstatement provision that were initially proposed in the House and Senate contained "before or after" language that paralleled the language in the previous reinstatement provision. See *Bejjani*, 271 F.3d at 685. That argument adds little to petitioner's unpersuasive contention that, by excluding the "before or after" language that appeared in the former reinstatement provision, Congress prescribed that Section 1231(a)(5) is inapplicable to aliens who reentered before IIRIRA's effective date.

law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. Petitioner, by contrast, would invoke the presumption against retroactivity at the outset as a reason to construe Section 1231(a)(5) as implicitly specifying its temporal reach, regardless of whether the application of Section 1231(a)(5) in that situation would have a "retroactive effect." However, in the absence of such an effect, application of the statute would not be "retroactive" in the first place, and no presumption would apply. See Pet. App. 14a ("[A]lthough Congress is deemed to act with the *Landgraf* 'default rule' in mind, an equally valid conclusion is that Congress remained silent in expectation that the courts would proceed to determine, on a case-by-case basis, whether the statute would have an impermissibly retroactive effect."); *Alvarez-Portillo*, 280 F.3d at 864-865.[7]

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[7] Petitioner also observes (Pet. 15) that certain provisions of IIRIRA specifically provided that they apply to conduct predating the statute's effective date. That argument is undermined by the fact that other provisions in IIRIRA specifically provided that they do *not* apply to conduct predating IIRIRA's effective date or date of enactment. See Pet. App. 14a ("[N]o negative implication may be drawn from the fact that some sections of IIRIRA require application to pre-enactment conduct, when other IIRIRA sections prohibit application to pre-enactment conduct."); *Sarmiento Cisneros*, 381 F.3d at 1282; *Arevalo*, 344 F.3d at 13; *Avila-Macias*, 328 F.3d at 113. Of particular significance, when Congress in IIRIRA expanded the scope of the criminal prohibition against unlawful re-entry, 8 U.S.C. 1326, Congress specified that the amendment would apply only to re-entries "occurring on or after" the "date of the enactment of this Act." IIRIRA § 324(c), 110 Stat. 3009-629. Moreover, this Court has rejected efforts to draw conclusions about the retroactive effect of statutory provisions that are silent as to their application to pre-enactment conduct from distinct provisions that address retroactivity expressly. See *Landgraf*, 511 U.S. at 257-263.

2. Because the court of appeals disagreed with the conclusion of the Sixth and Ninth Circuits and determined instead that Congress did not clearly prescribe the temporal reach of Section 1231(a)(5), the court proceeded to assess whether application of Section 1231(a)(5) to petitioner would entail a "retroactive effect." The court concluded that application of Section 1231(a)(5) to petitioner would not produce a retroactive effect, emphasizing that petitioner had neither applied for adjustment of status nor become married before IIRIRA's effective date. Pet. App. 17a-18a. In those circumstances, the court reasoned, petitioner "had no protectable expectation of being able to adjust his status." *Id.* at 17a.

a. Petitioner argues (Pet. 19-22) that applying Section 1231(a)(5) to any alien whose illegal re-entry predated IIRIRA's effective date would entail a retroactive effect. He reasons that, because Section 1231(a)(5) renders all such aliens ineligible for discretionary relief from removal, the provision increases liability for past conduct in a manner that results in a retroactive effect. In support of that argument, petitioner relies (Pet. 20) on this Court's observation in *INS* v. *St. Cyr*, *supra*, that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 325. Petitioner's argument lacks merit.[8]

The Court has explained that "a statute is not made retroactive merely because it draws upon antecedent

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[8] Petitioner's argument in favor of a retroactive effect is limited to Section 1231(a)(5)'s elimination of discretionary relief from removal. Petitioner does not contend that other changes brought about by Section 1231(a)(5), see note 1, *supra*, render application of the provision retroactive in effect. See Pet. 19 n.15.

facts for its operation." *Landgraf*, 511 U.S. at 270 n.24 (internal quotation marks omitted). Indeed, "[e]ven uncontroversially *prospective* statutes may unsettle expectations and impose burdens on past conduct," such as a "new property tax or zoning regulation" that "upset[s] the reasonable expectations that prompted those affected to acquire property," or a "new law banning gambling" that "harms the person who had begun to construct a casino before the law's enactment." *Id.* at 269 n.24 (emphasis added). Section 1231(a)(5) is "uncontroversially prospective" in the same sense. Just as a new property tax is applied on a going forward basis, Section 1231(a)(5) reflects Congress's intention to apply new rules for the reinstatement of removal orders on a going forward basis. Because the provision aims to streamline the process for removing aliens who are found to have illegally re-entered the country, its application to reinstatement proceedings that take place after IIRIRA's effective date is inherently prospective. Petitioner's retroactivity argument erroneously focuses on the past re-entry rather than on the reinstatement procedure, while the statute focuses on the latter.

Furthermore, whether the application of a statute qualifies as "retroactive" turns on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270; see *Martin*, 527 U.S. at 357-358. Judged by those standards, the application of Section 1231(a)(5) does not produce a "retroactive effect." As an initial matter, Section 1231(a)(5) did not have the effect of converting conduct that was lawful when it took place into unlawful conduct. Rather, the immigration laws have long proscribed—and made criminal—an illegal re-entry by an alien who was previously ordered removed. See, *e.g.*, 8 U.S.C. 1326. Be-

cause an alien who illegally re-entered the country before Section 1231(a)(5)'s effective date was engaging in an unlawful and criminal act, there is minimal force to any claim that applying the provision's elimination of discretionary relief from removal to such an alien would be unfair, affect primary conduct, or interfere with legitimate expectations. See *Landgraf*, 511 U.S. at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation."). See also *id.* at 281-282.[9]

Although Section 1231(a)(5) eliminates the availability of discretionary relief from removal to an alien who re-entered the country illegally and whose previous removal order is reinstated, that feature does not have a "retroactive effect" within the meaning of this Court's decisions. The Court's analysis in *St. Cyr* is instructive. The Court held that IIRIRA's elimination of discretionary relief from removal under former 8 U.S.C. 1182(c) (1994) for aliens who are convicted of an aggravated felony resulted in a "retroactive effect" in the case of an alien who had pleaded guilty to an aggravated felony before IIRIRA's effective date. 533 U.S. at 321-325. The Court explained that aliens consider the immigration consequences of a conviction when deciding whether to enter a guilty plea, and that preserving the possibility of discretionary "relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. Because aliens relied upon the availability of discretionary relief in deciding to enter into a guilty plea,

[9] By contrast, the prior conduct that triggered retroactivity concerns in *St. Cyr*—the alien's entering into a plea of guilty, see 533 U.S. at 321-324—was entirely lawful.

the Court reasoned, "it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations' to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief." *Id.* at 323-324 (quoting *Landgraf*, 511 U.S. at 270) (citation omitted).

The application of Section 1231(a)(5) to an alien whose illegal re-entry predated IIRIRA's effective date does not implicate the concerns of detrimental reliance or unfair notice that gave rise to the Court's finding of a "retroactive effect" in *St. Cyr*. While the Court reasoned in *St. Cyr* that an alien might have made a different decision concerning whether to enter a guilty plea if discretionary relief from removal were unavailable to him, an alien whose unlawful re-entry predated IIRIRA's effective date could make no comparable claim. An alien who illegally re-entered notwithstanding the prospect of criminal prosecution and punishment could make no persuasive claim that he nonetheless may have elected to forgo an illegal re-entry if he were ineligible to seek discretionary relief from removal.

Moreover, in the context of the present case, an alien who unlawfully re-enters the United States generally is not qualified at that time to obtain an adjustment of status that would enable him to remain here lawfully. See 8 U.S.C. 1255(i)(2) (requiring that alien be "eligible to receive an immigrant visa" and be "admissible" for permanent residence in order to qualify for adjustment of status). An alien therefore could have no reasonable expectation of obtaining an adjustment of status at the time of his illegal re-entry. As the court of appeals explained, "[i]t would be a step too far to hold that simply by re-entering the country, [petitioner] created a settled expectation that *if* he did marry a U.S. citizen, he *might*

then be able to adjust his status and defend against removal." Pet. App. 17a. In its opinion in *St. Cyr*, the Second Circuit similarly distinguished between an alien's decision whether to commit a crime that renders him removable and an alien's later decision whether to plead guilty to such a crime. *St. Cyr* v. *INS*, 229 F.3d 406, 418-419 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001). With respect to the decision whether to commit the crime in the first place, the court explained that it "would border on the absurd to argue that * * * aliens might have decided not to commit drug crimes * * * had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at 418. This Court affirmed the Second Circuit's decision in *St. Cyr*, and gave no indication that it disagreed with that aspect of the court of appeals' analysis.

Finally, although application of Section 1231(a)(5)'s bar against discretionary relief from removal to petitioner has the effect of rendering him ineligible to apply for an adjustment of status, an "adjustment of status is merely a procedural mechanism by which an alien [who is already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (Bd. of Immigr. Appeals 1992). Before Congress created the mechanism of an adjustment of status in 1952, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already within the United States is treated as if he were seeking admission from abroad but is permitted to remain here while the application is pending. See *ibid.*;

Tibke v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S—*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962). An adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. This understanding of the adjustment-of-status process underscores the lack of any retroactive effect. Because Section 1231(a)(5)'s application to petitioner ultimately affects the procedures by which, and the location from which, he may seek discretionary admission into the country, the provision's application is not retroactive in effect. Compare *Landgraf*, 511 U.S. at 274 (explaining that statutes "conferring or ousting jurisdiction" apply in pending cases because "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case") (internal quotation marks omitted); *id.* at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.").[10] For all of those reasons, the court of appeals was correct in concluding that the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, does not mean that application of Section 1231(a)(5) to the alien would entail a "retroactive effect."

b. Among the majority of courts of appeals that have held that Congress did not prescribe Section 1231(a)(5)'s

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[10] When an alien who has illegally re-entered the country is removed based on the reinstatement of his previous removal order, the removal could result in his becoming inadmissible for a fixed number of years, depending on the circumstances. See 8 U.S.C. 1182(a)(9)(A)(ii). In many situations, the period of inadmissibility is subject to discretionary waiver. See 8 U.S.C. 1182(a)(9)(A)(iii).

temporal reach and that therefore have proceeded to the second step of the retroactivity inquiry, no court of appeals has held that the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, establishes that application of Section 1231(a)(5) would have a "retroactive effect." The First, Seventh, and Eleventh Circuits have held that, where an alien not only had illegally re-entered the United States before IIRIRA's effective date but also had applied for adjustment of status by that date, application of Section 1231(a)(5) would result in a retroactive effect. See *Faiz-Mohammad*, 395 F.3d at 809-810; *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14. The courts of appeals disagree on whether Section 1231(a)(5) also produces a retroactive effect when applied to an alien who had not filed an application for adjustment of status by IIRIRA's effective date but had become married to a United States citizen by that date. The Eighth Circuit has held that Section 1231(a) gives rise to a retroactive effect in that situation, see *Alvarez-Portillo*, 280 F.3d at 867, but the Fourth Circuit has reached the contrary conclusion, see *Velasquez-Gabriel*, 263 F.3d at 108-110.[11]

This case does not raise any issues of that type because petitioner neither became married nor applied for adjustment of status before IIRIRA's effective date. Accordingly, if this Court were to agree with the government and the majority of courts of appeals and conclude

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[11] The Seventh Circuit similarly held that Section 1231(a)(5) does not produce a retroactive effect where the alien's mother had filed a relative visa application on his behalf before IIRIRA's effective date but the alien had not applied for an adjustment of status. *Lubojewski* v. *Gonzales*, 407 F.3d 814 (2005). In reaching that conclusion, the court expressly disagreed with the approach of the Eighth Circuit in *Alvarez-Portillo*. See *id.* at 821-822.

that Congress did not prescribe the temporal reach of Section 1231(a)(5), the facts of this case would not present an opportunity to address whether Section 1231(a)(5) would have a retroactive effect when applied to an alien who had applied for adjustment of status before IIRIRA's effective date (or to an alien who had become married by that date). Instead, this case would raise only the question whether the mere fact that an alien's illegal re-entry predated IIRIRA's effective date, without more, renders application of Section 1231(a)(5) unfairly retroactive.[12]

Although the Court could consider awaiting a vehicle that might present certain of the other retroactivity issues potentially raised by Section 1231(a)(5)—such as whether the provision would be retroactive in the case of an alien who had applied for adjustment of status before IIRIRA's effective date—the government believes that review is warranted in this case. There is a square circuit conflict on whether Section 1231(a)(5) applies to an alien whose illegal re-entry predated IIRIRA's effective date. The provision does not apply in that situation in the Sixth and Ninth Circuits, see p.8, *supra*, but it does apply in the Tenth Circuit under the decision below as well as in other courts of appeals, see *Labojewski* v. *Gonzales*, 407 F.3d 814, 821-822 (7th Cir. 2005); *Velasquez-Gabriel*, 263 F.3d at 108-110. If this Court agrees with the government and concludes that Con-

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[12] The Third Circuit has recently held that Section 1231(a)(5) has a retroactive effect when applied to an alien who illegally re-entered the country before IIRIRA's effective date and who was eligible for voluntary departure at the time of his re-entry. See *Dinnall* v. *Gonzales*, 421 F.3d 247 (2005). Petitioner has not raised the argument that Section 1231(a)(5) is retroactive as applied to him because it eliminates the availability of voluntary departure.

gress did not prescribe Section 1231(a)(5)'s temporal reach and that application of the provision to petitioner does not have a retroactive effect, the Court's analysis will substantially inform the proper resolution of the various other retroactivity questions potentially raised by Section 1231(a)(5). Conversely, if this Court were to agree with petitioner and conclude either that Congress prescribed that Section 1231(a)(5) does not apply to any alien whose illegal re-entry predated IIRIRA's effective date or that application of the provision to any such alien would entail a retroactive effect, the Court's resolution would obviate the need to address any of the other retroactivity issues raised by Section 1231(a)(5) that have been considered by the courts of appeals.

Finally, the issue presented by the facts of this case is of substantial practical significance. Although it is difficult to formulate a reliable estimate of the number of aliens who unlawfully re-entered the country before IIRIRA's effective date and remain in the country, the government believes that the number is substantial and is likely to remain so for some time. The question whether Section 1231(a)(5)'s reinstatement provisions may be applied to such aliens when they are found within the country is of significant practical importance to the effective and efficient enforcement of the Nation's immigration laws. The importance of the issue is underscored by the fact that, according to statistics retained by the Department of Justice, the Ninth Circuit—one of the two courts of appeals that has adopted the sweeping rule that Section 1231(a)(5) may not be applied to any aliens who re-entered before its enactment—is currently responsible for roughly 45% of the immigration docket in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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For present purposes, the most important aspect of the government's response to the petition for a writ of certiorari is its conclusion: respondent, too, believes that this Court should grant the petition. See U.S. Br. 23. As the government acknowledges, the lower courts are irreconcilably split on the question presented—whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally before the effective date of IIRIRA. In fact, the government admits that there are circuit splits as to each of the two stages of the retroactivity analysis this Court outlined in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). See U.S. Br. 8, 20. In addition, the government acknowledges that "the issue is an important and recurring one." U.S. Br. 7; see also *id.* at 22; Pet. 22-23. Thus, this Court's review is clearly appropriate.

Despite the government's acquiescence, certain aspects of its response warrant brief rejoinders.

1. Although the government acknowledges that the federal courts of appeals have divided over how to analyze the retroactivity of Section 241(a)(5) under each half of the *Landgraf* retroactivity analysis, the government suggests that this case might not be an appropriate vehicle to resolve the split under the second half of that analysis, where courts must determine whether the application of a statute in a specific instance would give that statute an impermissible "retroactive effect" (511 U.S. at 280). See U.S. Br. 21. This simply is not true.

As we explained in the petition (at 19-22), it would be inappropriately retroactive to apply Section 241(a)(5) to preclude discretionary relief to any alien who reentered the United States before the effective date of IIRIRA, April 1, 1997. By contrast, the government has always taken the position that there is no retroactivity problem with interpreting

Section 241(a)(5) to preclude the Attorney General from granting discretionary relief under any circumstance after that date. This case presents the Court with an ideal vehicle with which to choose between these two conflicting views of the retroactive applicability of Section 241(a)(5) to aliens that reentered the United States prior to the effective date of IIRIRA.

Admittedly, some courts have drawn lines between these two extremes—such as by holding that the statute cannot apply to an alien that had applied for relief before the effective date of IIRIRA,[1] or to an alien that had remarried before that date.[2] But nothing about these rulings in any way suggests that the Court cannot use this litigation to decide the fundamental question, which is whether Section 241(a)(5) can ***ever*** apply to bar discretionary relief to an alien who reentered the United States before April 1, 1997.[3]

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[1] See *Arevalo* v. *Ashcroft*, 344 F.3d 1, 14 (1st Cir. 2003); *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 800 (7th Cir. 2005); *Sarmiento Cisneros* v. *U.S. Attorney General*, 381 F.3d 1277, 1284 (11th Cir. 2004).

[2] See *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 861-862 (8th Cir. 2002).

[3] Of course, were this Court to reach the question and to hold, as the government urges, that merely reentering the United States was not sufficient to trigger retroactivity concerns, in a future case the Court could nonetheless determine that the statute did not apply to an alien who had done ***more*** than merely reenter the country—*i.e.*, to an alien who was married to an American citizen before the effective date of IIRIRA or who had applied for discretionary relief before that date. But the government has never in fact argued that the statute applies in either of these instances. Rather, the government has consistently taken the position that it creates no retroactivity problem to apply the statute to any alien who had not already obtained discretionary relief prior to the effective date of IIRIRA. We, of course, disagree—and this case presents an appropriate opportunity for the Court to resolve that disagreement.

In any event, there is no doubt that there is a profound circuit split on this very issue, with at least two circuits on each side of that split: in the Sixth and Ninth Circuits, Section 241(a)(5) does not apply to ***any*** alien who reentered the United States before the effective date of IIRIRA,[4] whereas in the Fourth and Tenth Circuits it apparently applies to ***all*** aliens who reentered prior to that date.[5] Thus, the fact that the remaining courts that have reached the second stage of a *Landgraf* retroactivity analysis may have adopted intermediate approaches in no way diminishes either the existence of the avowed circuit split or the appropriateness of this case as a vehicle for its resolution.

2. The government spends a surprising amount of time in its brief addressing the merits of the case. Of course, the appropriate time to cross swords on substance is not now, but after this Court grants review. In any event, the government's merits discussion is full of holes—as a few brief examples indicate.

a. The government fails in its attempt to rebut our explanation for why, under the first stage of the *Landgraf* analysis—in which courts are required to determine "whether Congress has expressly prescribed the statute's proper reach" (*Landgraf*, 511 U.S. at 280)—it is plain that Congress intended Section 241(a)(5) to operate only prospectively to those aliens who reentered the United States after IIRIRA's effective date. See Pet. 14-15.

In particular, as we explained (at 14), the prior version of the statute, INA § 242(f) (1994), contained a provision explicitly specifying that the statute should apply retroactively. Section 241(a)(5) does not contain such a provision—a dif-

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[4] See *Bejjani* v. *INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001).

[5] See *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102 (4th Cir. 2001); Pet. App. 17a.

ference that, under the normal canons of statutory construction, must be given substantial weight. See Pet. 14-15.[6]

Similarly, the government does not deny that previous versions of the bill that became IIRIRA contained language that would have made Section 241(a)(5) explicitly retroactive—language that was omitted in the final version. See U.S. Br. 12 n.6. The government's effort to wish that language away is pretermitted by this Court's rule that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

Finally, the government focuses on INA § 276, 8 U.S.C § 1326—which "establish[es the] crime of illegal re-entry following previous removal" (U.S. Br. 10)—to argue that because Section 276 criminalizes illegal reentry, Section 241(a)(5) cannot also be intended to regulate illegal reentry. U.S. Br. 10. But in fact ***both*** provisions are designed to increase the penalties for illegal reentry, in different ways. Per-

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[6] The government's argument that we have misinterpreted the prior version of the statute is baseless. According to the government, the prior statute expressly specified that orders of deportation should be reinstated whether or not the prior ***deportation*** predated the effective date of that statute. See U.S. Br. 11. That is a thoroughly implausible reading of the text: the phrase "after having previously departed from or been deported pursuant to an order of deportation" (INA § 242(f) (1994)) is clearly intended to limit the class of aliens that have "unlawfully reentered the United States" to which the statute applies, and thus the temporal restriction applies to that class as limited rather than to the time of the initial deportation. In any event, even if the government's interpretation of the statute were correct, the prior statute, unlike the current statute, would still necessarily have ***explicitly*** applied retroactively to aliens who, after previously being deported, reentered illegally before the statute's effective date.

haps the best evidence for this is the fact that both provisions were amended by Section 305 of IIRIRA—Section 305(a)(3) codified the new INA § 241(a)(5), and Section 305(b) amended INA § 276. Moreover, both address the consequences of illegal reentry, which as a result sis the "'activity the statute was intended to regulate.'" U.S. Br. 10 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 363 (1999) (Scalia, J., concurring in part and concurring in the judgment)).

b. The government's argument about the correct way to analyze Section 241(a)(5) under the first stage of a *Landgraf* retroactivity inquiry also simply ignores our lengthy explanation of why the lower court erred by relying on a non-existent presumption ***against*** prospectivity in conducting that inquiry. See Pet. 16-18.

As we noted, in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), the Court found that the amendments made to 28 U.S.C. § 2254 by the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), apply only prospectively under the first step of a *Landgraf* analysis, despite some conflicting evidence as to Congress's intent on the question. Here, too, there is some conflicting evidence about the issue, but using the ordinary tools of statutory construction, as a court must (*Lindh*, 521 U.S. at 326), the best interpretation of the statute is that Congress intended it to apply only prospectively. See Pet. 14-15.

The government ducks this argument, instead responding only by quibbling with our discussion of the specific evidence demonstrating Congress's intent that the statute apply only prospectively. See U.S. Br. 9-13. Not only are these quibbles without merit (see pages 3-5, *supra*), but more importantly we have never claimed that the evidence is overwhelming or that it uniformly supports our position. Rather, like in *Lindh*, although the evidence may not "speak to the present issue with flawless clarity" (*Lindh*, 521 U.S. at 332), our position "accords more coherence" (*id.* at 336) to the

statute than any other. As this Court has explained, "[t]hat is enough." *Ibid.* Surprisingly, the government never even mentions *Lindh* in its brief, despite our reliance on the case.

c. The government's analysis of whether applying Section 241(a)(5) to bar discretionary relief would be impermissibly retroactive under stage two of a *Landgraf* inquiry is as flawed as its analysis under the first stage of that inquiry. For example, the government argues that Section 241(a)(5) does not have retroactive effect because "the immigration laws have long proscribed—and made criminal—an illegal reentry by an alien who was previously ordered removed." U.S. Br. 15. But this ignores *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in which this Court held that it would give an impermissibly retroactive effect to another provision of IIRIRA to apply the statute to alter the consequences of an already-illegal act. The government's effort to suggest that *St. Cyr* in fact supports the lower court's decision (see U.S. Br. 16-17) is unsuccessful. In each instance, IIRIRA alters the consequences of an underlying criminal act—in that case, an aggravated felony, in this case, illegal reentry. Just as it would have given IIRIRA an impermissibly retroactive effect to apply the statute to change the consequences of a guilty plea to an aggravated felony, so too would it give the statute an impermissibly retroactive effect to use it to preclude an alien who had illegally reentered prior to the effective date of IIRIRA from applying for discretionary relief.

Similarly, the government's argument that Section 241(a)(5)'s bar against discretionary relief is merely a change in procedural rules, and thus should not be viewed to have an impermissibly retroactive effect (see U.S. Br. 18-19), ignores reality. It is undisputed that "under [the] prior statutory regime for illegal reentry, [an alien's] marriage would have made him ***a likely candidate*** for adjustment of status to lawful permanent resident, though such relief was within the discretion of the Attorney General" (*Alvarez-Portillo*, 280 F.3d at 862 (emphasis added)), whereas after IIRIRA that alien

may not even apply for such relief. The government's argument also disregards this Court's explanation that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing ***possible*** deportation and facing ***certain*** deportation." *St. Cyr*, 533 U.S. at 325 (emphasis added). Thus, applying Section 241(a)(5) to preclude aliens from seeking discretionary relief from deportation would give the statute an impermissibly retroactive effect.

Regardless of the merits of the government's interpretation of Section 241(a)(5) under either stage of the *Landgraf* retroactivity analysis, the real point for present purposes is that—as both petitioner and the government agree—this Court should grant review and use this case to decide whether Section 241(a)(5) applies to aliens who reentered the United States prior to the effective date of IIRIRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

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QUESTION PRESENTED

Whether § 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5), which eliminates the right to obtain relief from removal for noncitizens who have illegally reentered the United States after having been deported, applies to individuals who reentered the United States before April 1, 1997, the effective date of that provision.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881. The November 17, 2003, final order of the Bureau of Immigration and Customs Enforcement (Pet. App. 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was timely filed on April 12, 2005, and was granted on October 31, 2005. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5), as enacted by § 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

IIRIRA § 309(a), codified as note following 8 U.S.C. § 1101, provides in relevant part:

> [T]his subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date

of the enactment of this Act [*i.e.*, April 1, 1997].

INA § 242(f) (1996), 8 U.S.C. § 1252(f) (1996), repealed by IIRIRA § 306(a)(2), provided in relevant part:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act [*i.e.*, June 27, 1952], on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.

Other statutory and regulatory provisions relevant to this case are set forth as an addendum to this brief.

STATEMENT

This case presents the question whether INA § 241(a)(5)—which eliminates the right to obtain relief from removal for noncitizens who have illegally reentered the United States after having been deported—applies to individuals who reentered the United States before the effective date of that statute.

Under the two-stage framework for retroactivity analysis set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), it is clear that INA § 241(a)(5) may *not* be applied to persons who reentered the United States before IIRIRA's effective date. First, applying standard rules of statutory construction, it is evident that Congress intended IIRIRA's reinstatement provision to apply only to individuals who reentered the United States after April 1, 1997. Second, even if congressional intent were not clearly discernable, application of INA § 241(a)(5) to persons who reentered the country before IIRIRA's effective date would be impermissibly retroactive because such application would impair pre-

existing rights and attach new legal consequences to events completed before the statute's enactment.

Resolution of the question presented will directly affect thousands of people—both noncitizens and their U.S.-citizen family members. It is no secret that many people, like petitioner, have illegally reentered the United States after being deported. Before IIRIRA's enactment, illegal reentrants were guaranteed the right to seek, and were eligible to receive, discretionary relief from deportation. Reentrants could reasonably expect that under a variety of circumstances—such as if, like petitioner, they married a U.S. citizen and led an otherwise law-abiding life over a sufficient number of years—they would have the opportunity to avoid deportation and possibly remain in the United States, notwithstanding the fact that they had reentered the country illegally. Indeed, one can safely assume that reentrants acted on that expectation, taking the possibility of relief into account when deciding to reenter the country. Petitioner and thousands of others similarly situated built lives in this country on the reasonable expectation that relief from deportation would be available. It would be grossly unfair—and contrary to this Court's precedent—if that expectation were now defeated, especially given the absence of a clear congressional mandate so commanding.

A. Statutory Background

Before April 1, 1997, the INA provided that if a person who had been deported for an enumerated reason (*e.g.*, commission of an aggravated felony) illegally reentered the United States, "the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." INA § 242(f) (1996), 8 U.S.C. § 1252(f) (1996). While the consequences of such reinstatement could be relatively harsh, Congress drafted the statute narrowly. That former reinstatement provision did not apply to noncitizens who were initially deported simply for entering the country without inspection or for any other reason not

specifically enumerated in 8 U.S.C. § 1252(e) (1996). Moreover, under pre-1997 immigration law, noncitizens who had unlawfully reentered the United States after a previous deportation could apply for various forms of relief from renewed deportation, even if their previous deportation orders were subject to reinstatement. For example, under 8 U.S.C. § 1255(i) (1996), persons who met certain conditions were allowed to avoid deportation by seeking and obtaining a discretionary adjustment of status to that of lawful permanent resident. This discretionary relief was available to individuals who, like petitioner, were married to a United States citizen who filed a visa petition on the noncitizen's behalf.[1]

In 1996, Congress dramatically changed this legal landscape by enacting IIRIRA. Effective April 1, 1997 (see IIRIRA § 309(a)), IIRIRA repealed INA § 242(f) and replaced it with INA § 241(a)(5). This new reinstatement provision differs from its predecessor in several significant ways.

First, while under the old regime only persons who had been deported on certain specified grounds were subject to having their earlier deportation orders reinstated, INA § 241(a)(5) applies broadly to all noncitizens who were previously removed.[2] See Pet. App. 10a; see also, *e.g.*, *Bejjani* v. *INS*, 271 F.3d 670, 675 (6th Cir. 2001).

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[1] Other forms of relief from deportation were also available to persons who had unlawfully reentered the country. For example, relief under 8 U.S.C. § 1255(i) was available to noncitizens who were beneficiaries of labor-certification applications filed on their behalf by a U.S. employer. Similarly, in appropriate circumstances noncitizens could seek suspension of deportation, voluntary departure, asylum, and various other forms of relief. See pages 37, *infra*

[2] What had been known as "deportation" before IIRIRA is now known as "removal." See, *e.g.*, *Romani* v. *INS*, 146 F.3d 737, 739 n.3 (9th Cir. 1998) ("The IIRIRA repeals [the deportation provision] and replaces it with a new removal proceeding provision to be codified at 8 U.S.C. § 1229a.").

Second, INA § 241(a)(5) specifies that the earlier removal order is "not subject to being reopened or reviewed," and thus may no longer be subject to at least some forms of collateral challenge. See *Bejjani*, 271 F.3d at 675.

Finally, as noted above, the precursor statute allowed noncitizens subject to reinstatement to apply for relief from deportation under other sections of the INA. The new reinstatement provision, by contrast, precludes them from applying for or receiving any form of relief under the INA. See INA § 241(a)(5); Pet. App. 11a; *Bejjani*, 271 F.3d at 675.

Consequently, application of this new statute operates to deny to a large class of noncitizens relief that was available to them under the old regime.

B. Factual Background

Petitioner Humberto Fernandez-Vargas is a native and citizen of Mexico. Before his 2004 deportation (see page 6, *infra*), he lived in the United States illegally, and had done so since the 1970s. See Pet. App. 3a. During the 1970s and early 1980s petitioner was deported from the United States several times for immigration violations, most recently in 1981. See Pet. App. 3a, 26a. In January 1982, shortly after the last of those deportations, petitioner again reentered the United States without inspection. Pet. App. 3a, 19a. During the next twenty years he resided primarily in Utah, worked as a truck driver, owned his own trucking business, and was never arrested for any reason. See A.R. 41-42.[3]

In 1989, petitioner and his long-time companion, Rita—a U.S. citizen—had a child, Anthony Fernandez, also a U.S. citizen. See A.R. 42. Petitioner and Mrs. Fernandez married on March 30, 2001. See Pet. App. 3a. Thereafter, Mrs. Fernandez filed an immediate-relative visa petition on behalf of petitioner pursuant to 8 U.S.C. § 1151(b), and petitioner filed an application for adjustment of status under 8 U.S.C.

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[3] A.R. refers to the Certified Administrative Record before the Tenth Circuit.

§ 1255(i). See Pet. App. 3a-4a; A.R. 41-46. Petitioner paid the $1,000.00 "penalty" fee for having entered the United States without inspection; the Immigration and Naturalization Service ("INS") accepted petitioner's application and fee notwithstanding his illegal reentry. See A.R. 45-46. Indeed, in light of the pending application for adjustment, the Bureau of Citizenship and Immigration Service ("BCIS")—the agency within the Department of Homeland Security that largely replaced the INS, and that is now known as the U.S. Citizenship and Immigration Services ("USCIS")—provided petitioner with employment authorization. See 10th Cir. Pet. Rev. 3-4.

On or about November 1, 2003, petitioner appeared at the Salt Lake City BCIS office for a routine interview in connection with his visa petition. But when he arrived, he was arrested by an officer from the Bureau of Immigration and Customs Enforcement, now known as U.S. Immigration and Customs Enforcement (collectively, "ICE"), based on ICE's assertion that his 1981 deportation order was subject to reinstatement under INA § 241(a)(5) and that, as a result, he was statutorily barred from applying for adjustment of status under 8 U.S.C. § 1255(i). See Pet. App. 4a. On November 7, 2003, ICE issued a notice of its intent to reinstate petitioner's prior deportation order. A.R. 4. On November 17, 2003, ICE issued an order reinstating petitioner's prior deportation order, see *ibid.*, and that same day issued a warrant commanding his arrest and removal from the United States. See Pet. App. 4a, 19a-20a. On September 9, 2004, after nearly a year of detention and while his petition for review was pending in the Tenth Circuit, petitioner was removed from the United States to Juarez, Mexico. See D. Romboy, *Outcast in Mexico, Outlaw in Utah*, DESERET MORNING NEWS, Oct. 9, 2005, at A1, *available at* http://deseretnews.com/dn/view/0,1249,615152228,00.html.[4] His wife and son remain in Utah. *Ibid.*

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[4] As the government concedes, the fact that petitioner has been

C. Proceedings Below

Pursuant to 8 U.S.C. § 1252(a) and (b)(2), and 28 U.S.C. § 2342, petitioner sought review of the ICE decision in the Tenth Circuit. Petitioner contended that because he had reentered the United States before the effective date of IIRIRA—April 1, 1997—INA § 241(a)(5) did not apply to his case, and that ICE had therefore erred in reinstating the previous deportation order and in refusing to allow him to pursue an adjustment of status under 8 U.S.C. § 1255(i).

The court of appeals' resolution of the case turned on the question whether INA § 241(a)(5) applies despite the fact that petitioner reentered the United States before the effective date of IIRIRA. The court analyzed this question using the analytical framework that this Court specified in *Landgraf* for determining whether a federal statute applies to pre-enactment conduct despite the strong historical presumption against retroactivity. Expressly noting that the issue had split the federal circuits (see Pet. App. 12a), the Tenth Circuit held that INA § 241(a)(5) applied to petitioner. See Pet. App. 18a.

Under *Landgraf*, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. Rejecting the contrary decisions of the Sixth and Ninth Circuits (see Pet. App. 12a, 16a (rejecting *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001), and *Bejjani*, 271 F.3d 670)), the Tenth Circuit held that Congress had not clearly provided that INA § 241(a)(5) applies only to individuals who reentered the United States after IIRIRA's effective date. Pet. App. 16a. In so holding, the court sided with six other circuits—the First, Third, Fourth, Fifth, Eighth, and Eleventh—that also "have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the temporal scope of INA § 241(a)(5)." Pet. App.

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removed to Mexico "does not moot the proceedings." U.S. Cert. Resp. 7 n.5 (citing *Bejjani*, 271 F.3d at 688-689).

12a-13a (citing *Sarmiento Cisneros* v. *United States Att'y Gen.*, 381 F.3d 1277, 1280-1284 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 10-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 112-114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 297-299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 864-865 (8th Cir. 2002); and *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 105-108 (4th Cir. 2001)).[5]

Having failed to find that congressional intent was sufficiently clear to allow it to stop with the first stage of *Landgraf*'s retroactivity analysis, the Tenth Circuit proceeded to the second stage, under which a court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see also Pet. App. 16a.[6]

The Tenth Circuit noted that a number of courts of appeals have "held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect." Pet. App. 16a-17a & n.12 (citing *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14; and *Alvarez-Portillo*, 280 F.3d at 861). It distinguished two of those cases on the ground that the petitioners in those cases had not only

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[5] Two weeks after the Tenth Circuit's decision in this case, the Seventh Circuit also held that Congress had not clearly defined the temporal scope of INA § 241(a)(5). See *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 804 (7th Cir. 2005)

[6] "If the statute *would* operate retroactively, [the] traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280 (emphasis added). No court has ever held that there is "clear congressional intent" that INA § 241(a)(5) apply retroactively. Thus, all courts would agree that if the statute has "retroactive effect" as applied to a person who reentered the United States before April 1, 1997, it would not apply.

reentered the United States before IIRIRA's effective date, but had also filed applications for adjustment of status before that date. See Pet. App. 17a-18a. The court acknowledged that in a third case—the Eighth Circuit's decision in *Alvarez-Portillo*—the petitioner had reentered the United States before IIRIRA's effective date but had not filed an adjustment application until after that date. It nonetheless distinguished *Alvarez-Portillo* on the ground that, unlike here, the petitioner not only had reentered the United States before IIRIRA's effective date but also had married a U.S. citizen before that date. See Pet. App. 17a n.12. The court concluded that applying INA § 241(a)(5) to petitioner would not give the statute retroactive effect because he had no "protectable expectation of being able to adjust his status" in that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." Pet. App. 17a.

As a result, the court held that INA § 241(a)(5) applied to petitioner and barred his application for adjustment of status.[7]

SUMMARY OF ARGUMENT

Applying *Landgraf*'s two-step framework, this Court should conclude that INA § 241(a)(5) does not apply to individuals, like petitioner, who reentered the United States before IIRIRA's effective date.

1. The temporal scope of INA § 241(a)(5) is readily ascertainable. As an initial matter, Congress specified that the changes introduced by IIRIRA not take effect until April 1, 1997. Application of several well-accepted rules of statutory construction confirms that Congress intended just what that plain language provides—that INA § 241(a)(5) does not im-

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[7] In the court of appeals petitioner also argued that INA § 241(a)(5) would not preclude his application for adjustment of status under 8 U.S.C. § 1255(i) even if the reinstatement statute were applicable to him. The court of appeals rejected this argument (see Pet. App. 4a-9a), and petitioner does not challenge that determination in this Court.

pose additional consequences on pre-enactment conduct like petitioner's reentry.

In enacting IIRIRA, Congress eliminated from the former reinstatement provision express language making reinstatement retroactively applicable to reentries occurring before the former statute's effective date. Had Congress intended the new statute to apply to persons in petitioner's circumstances, it could, and presumably would, have left the retroactivity language from the former statute unchanged. Congress's decision to remove this language is strong evidence that Congress did not intend for the new, harsher reinstatement provision to apply retroactively. This Court must give effect to that congressional determination. See Part I.A.1, *infra*.

The legislative history of the statute confirms this interpretation of INA § 241(a)(5). Congress considered and *rejected* language that would have made the new provision expressly retroactive. The House and the Senate initially disagreed regarding the appropriate scope of the reinstatement provision. The Senate's version of the bill would have applied reinstatement to a narrow class of reentrants, but would have included language requiring the statute to apply retroactively. In contrast, the House bill applied to a broader class of reentrants, but did not contain any retroactivity language. A bipartisan committee resolved this dispute by adopting the House version of the bill and excluding any retroactivity language. By doing so, Congress implicitly proscribed the retroactive application of INA § 241(a)(5). See Part I.A.2, *infra*.

Moreover, this Court must assume that Congress enacted IIRIRA with knowledge of the applicable background legal rules, including the strong presumption against retroactive application of statutes. Thus, Congress knew or must be deemed to have known the necessity of being explicit if it intended that any provision of IIRIRA, including the reinstatement provision, apply to conduct antedating the statute's effective date. Against this background rule, Congress's si-

lence reveals its intent that INA § 241(a)(5) not apply to reentries that occurred before its enactment. See Part I.A.3, *infra*.

Further, the longstanding principle of construing ambiguities in immigration statutes in favor of aliens counsels against retroactive application of the reinstatement provision. This rule recognizes the drastic hardship deportation imposes on persons, like petitioner, who have established deep roots in this country despite having entered unlawfully. Therefore, any ambiguity as to the temporal scope of IIRIRA's reinstatement provision should be interpreted against its retroactive application. See Part I.A.4, *infra*.

Rather than resolving the perceived ambiguity in INA § 241(a)(5) in petitioner's favor, the Tenth Circuit erroneously held that the statute itself would not control the temporal-scope inquiry absent an *unambiguous* showing that Congress intended the statute to apply prospectively. This approach effectively eviscerates the traditional presumption against retroactivity. Nothing in this Court's retroactivity jurisprudence suggests that unambiguous clarity is needed before a court should interpret a statute only to apply to future conduct. Rather, applying the traditional presumption, this Court has determined that when the ordinary rules of statutory construction support the conclusion that Congress intended the statute to apply only prospectively, that construction of the statute controls even if the statute is not entirely clear on the issue. Adequate evidence of congressional intent exists such that this Court should conclude that only prospective application of INA § 241(a)(5) is authorized. See Part I.B, *infra*.

2. Application of INA § 241(a)(5) to petitioner is also inappropriate because that application would afford the statute an impermissibly retroactive effect under stage two of a *Landgraf* analysis. The provision regulates reentry into the United States. It penalizes persons who illegally reenter the country after having been previously deported and, in par-

ticular, denies such persons the right to seek and the opportunity to receive the discretionary relief from deportation to which they would otherwise be entitled. Because it is illegal reentry that triggers the statute's application, it is that act that constitutes the relevant event for purposes of retroactivity analysis. See Part II.A, *infra*.

Before IIRIRA took effect on April 1, 1997, persons who illegally reentered the United States after a prior deportation had the right to seek, and were eligible to receive, various forms of discretionary relief from renewed deportation, including adjustment of status, suspension of deportation, and voluntary departure. INA § 241(a)(5) now deprives these same people of that right and those opportunities. Thus, when applied to persons who reentered the United States before April 1, 1997, INA § 241(a)(5) attaches a new legal consequence to the previously completed act of illegal reentry. See Part II.B.1, *infra*.

Petitioner reentered the United States in 1982. From the day he reentered through the day IIRIRA took effect, petitioner was immediately eligible to seek and obtain discretionary relief from deportation. Under the law as it stood before IIRIRA, petitioner could have sought such relief either proactively or defensively in a deportation proceeding. By depriving petitioner and others who reentered the United States before April 1, 1997, of the opportunity to obtain such relief, INA § 241(a)(5) has an impermissibly retroactive effect when applied to him and those similarly situated. See Part II.B.2, *infra*.

The fact that the relief that was available to petitioner and other illegal reentrants before April 1, 1997, was discretionary is immaterial. Although there was no guarantee that a particular person would be granted discretionary relief, each person who reentered the country before April 1, 1997, had a right to seek, and was eligible to receive, such relief. By depriving reentrants of that right, INA § 241(a)(5) converts what had previously been *possible* deportation into what is

now *certain* deportation. That conversion, which is of immense practical significance to reentrants facing deportation, is—as recognized by this Court in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—sufficient to make application of INA § 241(a)(5) to petitioner and those similarly situated impermissibly retroactive. See Part II.C, *infra*.

Because discretionary relief from deportation—which could greatly alleviate the practical consequences of illegal reentry—was readily available before IIRIRA, persons who reentered the country before April 1, 1997, are likely to have done so with the reasonable expectation that they could in fact seek and obtain such relief. Nonetheless, as established by *Landgraf*, *Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and *St. Cyr*, petitioner has no obligation to prove that he himself in fact relied on prior law in order to demonstrate that application of INA § 241(a)(5) to him would be impermissibly retroactive. See Part II.D, *infra*.

Finally, retroactive application of INA § 241(a)(5) to petitioner would be extremely unfair. Petitioner lived in the United States for more than two decades after reentering the country. During that time he built a productive, law-abiding life. He married a U.S. citizen, raised a U.S.-citizen child, built a successful business, and was never arrested. After more than two decades in the United States, deportation is tantamount to exile. It would be particularly unjust to deprive petitioner of the opportunity to obtain discretionary relief from deportation as a result of his illegal reentry more than twenty years ago when people who did *not* lead law-abiding lives after entering the United States are, under *St. Cyr*, guaranteed precisely that opportunity. See Part II.E, *infra*.

ARGUMENT

The government has interpreted IIRIRA's reinstatement provision to work a dramatic change in the legal consequences of petitioner's 1982 reentry. Petitioner reentered the United States under a statutory scheme that enabled him to seek to become a lawful resident from within the country.

Nonetheless, based on that 20-year-old act of reentry, Petitioner has been ripped from his family, removed to Mexico, and deprived of his pre-existing right to pursue the discretionary relief he almost certainly would have been afforded under prior law. Because there is no indication that Congress intended such retroactive application of INA § 241(a)(5), the government's interpretation of that provision is untenable.

The principle that "[r]etroactivity is not favored in the law," *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), is not new. As this Court has stated, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; see also *ibid.* ("'The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'") (quoting *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Indeed, as Chief Justice Marshall declared,

> It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable.

Reynolds v. *McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829).

In the criminal context, such retroactive legislation is flatly prohibited by the *Ex Post Facto* Clause of the Constitution. In the civil context, "[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r*, 323 U.S. 141, 164 (1944).[8] As Justice Brandeis has observed, "[t]hat a statute

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[8] As this Court noted in *Landgraf*, the general principle against retroactive legislation finds expression in numerous constitutional provisions applicable in the civil context:

shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application." *United States* v. *St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 3 (1926).

More recently, this Court has set forth a two-step framework for determining whether a statute may permissibly be applied to conduct antedating its enactment despite the strong presumption against retroactivity. First, a court is to "determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If the statute's proper reach is either expressly stated or discernable through the "normal rules of construction," then the statute controls and the retroactivity inquiry ends. *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997). When the proper reach of the statute cannot be ascertained, "the court must determine whether the new statute would have a retroactive effect," in which case the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280; see also *St. Cyr*, 533 U.S. at 326; *Martin* v. *Hadix*, 527 U.S. 343, 361-362 (1999).

Both steps of the *Landgraf* analysis lead to the conclusion

Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I §§ 9-10, prohibit the legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application.

Landgraf, 511 U.S. at 266.

that INA § 241(a)(5) may not be applied to deny persons who reentered the United States before IIRIRA's effective date their pre-existing right to pursue discretionary relief from removal.

I. Congress Intended INA § 241(a)(5) To Apply Only To Persons Who Reentered The United States After April 1, 1997.

This Court's first task is to determine the temporal reach of INA § 241(a)(5) using the normal rules of statutory construction. Although the text of INA § 241(a)(5) does not explicitly state the temporal scope of that provision, Congress provided generally that IIRIRA would not be effective until April 1, 1997, the "first day of the first month beginning more than 180 days after the date of enactment." IIRIRA § 309(a). Application of several well-recognized principles of statutory construction, in conjunction with the plain language of IIRIRA's effective date, lead to the unavoidable conclusion that Congress specifically intended INA § 241(a)(5) to apply only to individuals who reentered the United States after April 1, 1997. Thus, here, as in *Lindh*, there is no need to reach the question whether the statute has retroactive "effect" under step two of *Landgraf*.

A. Using ordinary rules of statutory construction, INA § 241(a)(5) should be interpreted to apply only to those persons who reentered after IIRIRA's effective date.

1. The proper interpretation of INA § 241(a)(5) must give effect to Congress's elimination of retroactivity language from the previous reinstatement provision.

That Congress did not intend INA § 241(a)(5) to apply to noncitizens who reentered the United States before April 1, 1997, is made clear by comparing that provision to its predecessor. As explained above, "INA § 241(a)(5) replaced the former reinstatement provision, INA § 242(f), 8 U.S.C.

§ 1252(f) (repealed 1996)." Pet. App. 2a. The repealed provision was more limited in scope and effect than the new provision, but expressly provided that it was applicable to all persons who illegally reentered the United States "whether before or after the date of enactment of this Act," June 27, 1952. See INA § 242(f) (1996); Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). As several courts have noted, "[t]his language clearly expressed Congress's intent that prior orders of deportation could be reinstated even if the alien reentered the country prior to the enactment of that reinstatement provision." *Bejjani*, 271 F.3d at 684; see also, *e.g.*, *Arevalo*, 344 F.3d at 12; *Castro-Cortez*, 239 F.3d at 1051. But when Congress rewrote the reinstatement provision in 1996, it eliminated the language making reinstatement applicable to persons who unlawfully reentered before the statute's effective date (while simultaneously providing that reinstatement would apply to a broader class of illegal reentrants). Compare INA § 242(f) (repealed 1996) with INA § 241(a)(5).

This Court has long recognized the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect." *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992). The only interpretation of INA § 241(a)(5) that gives effect to Congress' elimination of the retroactivity language from the predecessor provision is that Congress intended the current provision to apply only prospectively to reentries occurring after IIRIRA's effective date. Had Congress intended to apply IIRIRA's new reinstatement provision to reentries that occurred before its enactment, Congress would have either updated the express retroactivity language in the prior statute to reflect IIRIRA's effective date or left the retroactivity language from the previous provision unchanged.[9] Instead, Congress eliminated the

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[9] As originally enacted, the prior provision specified that it applied to reentries antedating "enactment of this Act." Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). The version contained

retroactivity language entirely. That change in language would be entirely ineffectual if INA § 241(a)(5) is interpreted to apply as if it had the same explicitly retroactive language that was contained in the predecessor statute.

Congress's omission of retroactivity language from INA § 241(a)(5) is strong evidence that it disapproved of applying the new reinstatement provision retroactively.[10] See *Brewster* v. *Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."); *Nalley* v. *Nalley*, 53 F.3d 649, 652 (4th Cir. 1995) ("When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning."). Having expressly provided that the former reinstatement provision would apply to reentries pre-dating its effective date, Congress could be expected to include similar

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in the U.S. Code replaced that phrase with the specific date—June 27, 1952. Congress could have incorporated either into the new reinstatement provision. As the Ninth Circuit has noted, "Congress often leaves specific dates in statutory provisions without updating the date when it revises the statute with the effect that the updated provision applies retroactively from the initial, unchanged date in the statute." *Castro-Cortez*, 239 F.3d at 1051 n.15 (citing 26 U.S.C. § 171(b)(1)(B)(ii)).

[10] There are any number of reasons why Congress may have decided not to apply INA § 241(a)(5) retroactively. As noted above (at 3-4), INA § 241(a)(5) applies to a far broader class of aliens than did its predecessor. Thus, Congress may have eliminated the prior retroactivity language precisely because the new reinstatement provision greatly expanded the class of persons subject to its reach. Moreover, Congress presumably was aware that retroactive application of INA § 241(a)(5) would upset settled expectations of noncitizens who, like petitioner, reentered the United States decades before IIRIRA's enactment under a statutory scheme in which they were entitled to apply for discretionary relief from future deportation. See Part II.D, *infra*.

language in the current statute had it intended the new reinstatement provision also to apply retroactively. It would violate ordinary rules of statutory construction, and defy common sense, to conclude that, despite removing all retroactivity language, Congress intended to leave open the possibility of applying INA § 241(a)(5) retroactively to immigrants who reentered the United States before IIRIRA's effective date. See *Castro-Cortez*, 239 F.3d at 1051 ("Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment."); *Bejjani*, 271 F.3d at 684 ("[T]he complete elimination of the retroactive language from the reinstatement provision is persuasive evidence that Congress did not intend for the new reinstatement provision to apply to reentries which occurred prior to the statute's effective date.").[11]

This Court drew a similar inference of prospective intent in *Lindh* by noting the differences in two closely related statutory provisions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The Court held that Congress's inclusion of retroactivity language in one provision "indicat[ed] implicitly" that the provision excluding such language was intended to apply only prospectively. 521 U.S. at 327. Although the inference in *Lindh* was drawn from two

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[11] The Tenth Circuit agreed that "Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospectively." Pet. App. 14a. However, the court erroneously held that this indication of congressional intent was insufficient to meet the requirement of absolute clarity purportedly set forth in *Landgraf*. See *id.* at 15a-16a. As we explain below, such absolute clarity is not required when the ordinary rules of statutory construction lead a court to conclude that a statute applies only *prospectively*. See Part I.B, *infra*.

parallel provisions of the same statute, that inference is no less applicable here, when Congress amended the earlier reinstatement provision to exclude all retroactive language. Here, as in *Lindh*, "[n]othing * * * but a different intent explains the different treatment." *Id.* at 329.

Although the elimination of retroactivity language in INA § 241(a)(5) reveals specific congressional intent to apply the statute only prospectively—a conclusion reinforced by the legislative history (see Part I.A.2, *infra*)—even inadvertent omissions of statutory language must be given legal effect. In the words of Justice Brandeis:

> The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Iselin v. *United States*, 270 U.S. 245, 250-251 (1926). As in *Iselin*, the government herein effectively asks this Court to enlarge IIRIRA's carefully drafted language by reinserting the retroactivity language from prior law that Congress omitted from INA § 241(a)(5). Given that all available evidence strongly suggests that the omission was *intentional*, the government's suggested interpretation would "transcend[] the judicial function" to an even greater extent than were that omission merely inadvertent.[12]

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[12] In *Sarmiento Cisneros*, the Eleventh Circuit agreed that "the removal of the retroactivity language from the statute lends weight to" the argument that INA § 241(a)(5) was not intended to apply to prior reentries, but also remarked that "[a]nother rational explanation for the removal of the language is that Congress believed the language was surplusage." 381 F.3d at 1282. That latter conclusion is flatly inconsistent with this Court's recognition that Congress is presumed to know the legal background against which it legislates. As explained more fully below (see Part I.A.3, *infra*), this Court's

2. The legislative history of INA § 241(a)(5) confirms that Congress intended that provision to apply only prospectively.

The legislative history of INA § 241(a)(5) confirms that Congress's decision to omit the prior retroactivity language from INA § 241(a)(5) was no accident.[13] Rather, Congress explicitly "considered and *rejected* new language which would have applied the new reinstatement provision to illegal reentries which occurred before the date of enactment." *Bejjani*, 271 F.3d at 685 (emphasis added). This too is strong evidence that Congress intended INA § 241(a)(5) to apply only prospectively.

The current reinstatement provision originated with a bill (H.R. 2202) passed in the House in March 1996. See H.R. REP. NO. 104-469(I), at 26 (1996), 1996 WL 168955; 142 Cong. Rec. H2589 (March 4, 1996). At that time, the Senate was simultaneously considering a different version of the immigration-reform bill (S.1664), that contained a reinstatement provision that, like the statute then in effect, applied only to a narrow class of deported individuals and included express retroactivity language. S. REP. NO. 104-249, at 118 (1996), 1996 WL 180026.

When the House bill was called up on the Senate floor in May 1996, the Senate amended the bill by replacing the

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decision in *Landgraf* put Congress on notice as to the "wisdom of being explicit" if it intends a statute to apply retroactively, even when the statute in question may not have true retroactive effect. *Lindh*, 521 U.S. at 328. Against that background legal rule, Congress's silence as to the retroactive effect of INA § 241(a)(5) weighs heavily in favor of interpreting it to apply only prospectively. Affirmative *removal* of retroactivity language is even weightier evidence that Congress did not intend the statute to apply retroactively.

[13] This Court routinely looks to legislative history to determine whether Congress prescribed the temporal reach of a statute. See, *e.g.*, *Lindh*, 521 U.S. at 329-330 & n.6; *Landgraf*, 511 U.S. at 262.

House's version of the text with its own version, which included retroactivity language in the reinstatement provision. See 142 Cong. Rec. S4610-S4612 (May 2, 1996). The bill then returned to the House, which noted its disagreement with the Senate amendment and agreed to a conference. See 142 Cong. Rec. H10194-H10195 (Sept. 11, 1996). Two weeks later, a bipartisan conference committee emerged with a compromise bill that included the House's broader version of the reinstatement provision (thus applying to all previously deported persons), but that excluded the Senate's explicit retroactivity language. See H.R. REP. NO. 104-828, at 54 (1996), 1996 WL 563320.

As this Court has recognized, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting)); cf. *Lonchar* v. *Thomas*, 517 U.S. 314, 325-327 (1996) (refusing to interpret the habeas rules to relax the prejudice requirement because Congress "*rejected*, by removing from the draft Rule, a provision that would have eased the burden of the prejudice requirement").

A difference between the language of a prior version of a bill and the enacted version is particularly strong evidence of congressional intent when, as here, "it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *Goncalves* v. *Reno*, 144 F.3d 110, 132 (1st Cir. 1998); cf. *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). In such a context, Congress's intent is clearly manifested by its decision not to include the disputed lan-

guage. See, *e.g.*, *Massachusetts Assoc. of Health Maint. Orgs.* v. *Ruthardt*, 194 F.3d 176, 185 (1st Cir. 1999) ("Congress sometimes can speak as clearly by opting not to enact proffered language as by enacting it.").

Applying this cannon of construction in a similar context, the lower courts have uniformly held that AEDPA § 440(d) does not apply to cases pending before its enactment. That provision purported to expand the definition of an aggravated felony for immigration purposes and thereby to restrict the availability of certain discretionary relief from deportation. Courts that confronted the question whether AEDPA § 440(d)'s restrictions applied to cases pending at the time AEDPA was enacted looked to that statute's legislative history and noted that the Senate version, in contrast to the House version, included explicit language making the restrictions in AEDPA § 440(d) applicable to all pending cases. However, the "compromise bill that came out of the conference committee * * * did not contain the Senate bill's language on retroactivity." *Henderson* v. *INS*, 157 F.3d 106, 130 (2d Cir. 1998). As these courts explained, the contrasting language between the Senate version and the version actually enacted is more than adequate evidence of Congress's intent that the statute apply only prospectively. See, *e.g.*, *Pak* v. *Reno*, 196 F.3d 666, 676 (6th Cir. 1999) ("Congress had considered a retroactivity provision but decided against it. With such strong evidence of congressional intent, we refuse to include in the language of the statute a provision that Congress chose to omit."); *Sandoval* v. *Reno*, 166 F.3d 225, 241 (3d Cir. 1999) (noting that Congress deleted retroactivity language contained in prior version of bill and holding that "[t]his legislative history confirms that Congress deliberately chose to make AEDPA § 440(d) apply prospectively"); see also, *e.g.*, *Henderson*, 157 F.3d at 130; *Goncalves*, 144 F.3d at 131-133; *Shah* v. *Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 610-611 (9th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1303-1304 (11th Cir. 1999).

In sum, because Congress explicitly considered and rejected language applying the reinstatement provision to conduct antedating IIRIRA's effective date, this Court should not interpret the provision to do just that.

3. Congress enacted INA § 241(a)(5) against the background of this Court's default rule against retroactivity.

Even if there were some lingering doubt about Congress's intent as to the retroactive applicability of INA § 241(a)(5), that provision must still be interpreted to apply only prospectively. In interpreting statutes, courts must assume that Congress knows the legal background against which it legislates. Thus, this Court has held that "the courts may take it as given that Congress has legislated with an expectation that the [background] principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (internal quotation marks omitted); see also *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533-535 (1994). Against the background of *Landgraf*'s default rule, congressional silence as to the temporal scope of INA § 241(a)(5) speaks volumes.

Just two years before Congress enacted IIRIRA, this Court reaffirmed the strong presumption against retroactivity and held that a statute would not be interpreted to apply retroactively absent a clear expression that Congress intended that result. See *Landgraf*, 511 U.S. at 272 ("prospectivity remains the appropriate default rule"). Moreover, this Court stressed that any enacted legislation would be interpreted against the background of this default rule. As the Court explained, "[s]uch a [clear intent] requirement * * * has the additional virtue of giving legislators a predictable background rule against which to legislate." *Id.* at 273. In essence, Congress has been put on notice as to the "wisdom of being explicit" if it intends a provision to be applied to conduct antedating a statute's effective date. *Lindh*, 521 U.S. at 328. Thus, "[n]otwithstanding whether a statute actually has an

impermissibly retroactive effect, Congress is deemed to enact legislation with *Landgraf*'s 'default rule' in mind." *Castro-Cortez*, 239 F.3d at 1052; see also *Bejjani*, 271 F.3d at 687 ("Congress is presumed to be familiar with the judicial presumption against retroactive application, and thus Congress must explicitly provide for such."); *Downer* v. *United States*, 97 F.3d 999, 1003 n.3 (8th Cir. 1996) (because Congress "is presumed to know the legal background in which it is legislating," "we interpret as intentional Congress's silence on the subject of retroactivity").

Against this strong background rule, Congress must be presumed to understand that it needs to provide clear instruction when it desires to give any specific statutory provision retroactive application. Indeed, in enacting IIRIRA, Congress knew to be explicit when it intended for provisions of that statute to apply retroactively: Several other sections of IIRIRA specifically state that they *are* to be applied retroactively.[14] *Bejjani*, 271 F.3d at 686 ("[C]omparing § 241(a)(5) to other provisions is useful in demonstrating that where Congress specifically wished for a provision to apply in a certain manner, Congress knew how to accomplish that, and did so throughout IIRIRA."); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted). Having done so elsewhere in the statute, Congress surely would have done so in INA § 241(a)(5) had it wished for that result.

In short, Congress knew—or must be deemed to have known—that its silence with regard to the temporal scope of INA § 241(a)(5) would be construed to mean that the new re-

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[14] See, *e.g.*, IIRIRA §§ 212(e), 322(c), 342(b), 347(c), 348(b) & 351(c).

instatement provision would apply only prospectively. See, *e.g.*, *Olatunji* v. *Ashcroft*, 387 F.3d 383, 389 (4th Cir. 2004) ("In the face of congressional silence on the temporal reach of a given statute, it is presumed that Congress did not intend for the statute to be applied retroactively."); *Downer*, 97 F.3d at 1003 n.3 ("we interpret as intentional Congress's silence on the subject of retroactivity"); *Boria* v. *Keane*, 90 F.3d 36, 38 (2d Cir. 1996) ("[The statute's] silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."). Nonetheless, rather than explicitly stating an intent for INA § 241(a)(5) to apply retroactively, as it had done in various other sections of IIRIRA, Congress specifically eliminated retroactivity language from the prior reinstatement provision and rejected a proposed version of the bill that contained explicit retroactivity language. When judged against *Landgraf*'s background rule, the only reasonable interpretation of Congress's silence is that "Congress intended § 241(a)(5) to encompass only post-enactment reentries." *Castro-Cortez*, 239 F.3d at 1052; *Bejjani*, 271 F.3d at 686 ("The absence of an express directive from Congress, viewed in light of *Landgraf*'s default rule, persuades us * * * that in this case, congressional silence is instructive.") (internal quotation marks omitted).[15]

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[15] Although, as the Tenth Circuit noted below, Congress also specified that certain sections of IIRIRA would apply only prospectively (Pet. App. 14a; see also U.S. Cert. Resp. 13 n.7), that does not undermine the argument that congressional silence with respect to INA § 241(a)(5) should be interpreted as providing for prospective application of that provision. Congress must be presumed to follow this Court's admonition to always speak clearly when seeking to apply a statute retroactively, even if it sometimes also unnecessarily speaks clearly when enacting prospective legislation. Importantly, Congress's clear language regarding the temporal scope of a provision closely related to INA § 241(a)(5) demonstrates its intent to apply only prospectively those sections of IIRIRA relating to reentries after a prior deportation. In expanding the scope of the criminal prohibition against unlawful reentry,

4. Any ambiguity in INA § 241(a)(5) must be construed in favor of the alien.

Finally, in addition to knowing that it must speak clearly to overcome the presumption against retroactivity, Congress must also be deemed to have enacted INA § 241(a)(5) with knowledge of "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; see also, *e.g.*, *St. Cyr*, 533 U.S. at 320 ("The presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien, forecloses the conclusion that, in enacting § 304(b), Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."); *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."). This rule of statutory construction recognizes that "deportation is a drastic measure," indeed, "a penalty." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10

Congress explicitly stated that criminal liability "shall apply to departures that occurred before, on, or after the date of the enactment of [IIRIRA], but *only with respect to entries (and attempted entries) occurring on or after such date*." IIRIRA § 324(c) (emphasis added). Congress's intent to expand criminal liability for reentries following *all* departures, even those predating IIRIRA—and its concomitant need to state that intent explicitly—required Congress to clarify that such liability would be imposed only prospectively on future reentries. As the Third Circuit explained, "it could well be argued that this is likely what Congress intended with regard to [INA § 241(a)(5)] as well." *Avila-Macias*, 328 F.3d at 113 n.6 (emphasis added). Indeed, there is no conceivable reason why Congress would want INA § 241(a)(5) and the criminal prohibition against unlawful reentry to apply differently, and this Court should interpret the provisions consistently.

(1948). In this case, petitioner's removal is a penalty for conduct—his illegal reentry—that occurred more than 20 years ago, at a time when the consequences for illegal reentry were far less severe than under the post-IIRIRA regime. Had Congress intended to upset the long-settled expectations of such reentrants, it had to do so clearly.

Because "the stakes are considerable for the individual," this Court should "not assume that Congress meant to trench on [petitioner's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Ibid.* As discussed above, the available evidence shows that Congress intended INA § 241(a)(5) to apply only prospectively. But to the extent that the Court concludes that this evidence does not resolve all ambiguity, the Court must "nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner." *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (construing statute narrowly in favor of petitioner even though "[t]o construe this statutory provision less generously to the alien might find support in logic"). This background rule of interpretation is one more reason why INA § 241(a)(5) must be interpreted to apply only prospectively.

* * * * *

In sum, using the ordinary tools of statutory construction, it is plain that Congress intended INA § 241(a)(5) to apply only prospectively to people who reentered the United States after IIRIRA's effective date.

B. An unambiguous expression of congressional intent is not needed for a court to find that, under *Landgraf* step one, Congress intended a statute to apply prospectively.

1. Even courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) operates only prospectively have acknowledged the force of the foregoing arguments. Indeed, the Tenth Circuit in this very case agreed that "Congress's elimination of the previous retroac-

tivity language lends weight to the argument that Congress intended the statute to apply only prospectively." Pet. App. 14a. Similarly, the Seventh Circuit observed that "[t]here is no question that some statutory evidence points to the conclusion reached by the Ninth and Sixth Circuits that Congress may not have desired [the reinstatement provision] to be applied retroactively." *Faiz-Mohammad*, 395 F.3d at 804.

The sole reason these courts have nonetheless proceeded to the second step of the *Landgraf* analysis is that they have inappropriately stood the presumption against retroactivity on its head and effectively created a non-existent presumption against *prospectivity*. For example, rather than end its analysis with the implication of prospectivity derived from the normal rules of statutory construction, the Tenth Circuit in this case erroneously relied on the *St. Cyr* decision to hold:

> Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore *unambiguously* intended for the statute *not* to apply to those aliens. Consequently, we must determine whether INA § 241(a)(5)'s bar of Fernandez' adjustment application is an impermissible retroactive effect of the statute.

Pet. App. 16a (second emphasis added). The other courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) operates only prospectively have made the same error, holding that "*Landgraf*'s first step is satisfied only where the 'statutory language [is] *so clear* that it could sustain *only one interpretation*.'" *Ojeda-Terrazas*, 290 F.3d at 298 (quoting *St. Cyr*, 533 U.S. at 317) (emphasis added); see also *Avila-Macias*, 328 F.3d at 113; *Alvarez-Portillo*, 280 F.3d at 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Arevalo*, 344 F.3d at 11-12; *Sarmiento Cisneros*, 381 F.3d at 1282; *Faiz-Mohammad*, 395 F.3d at 803-804; *Velasquez-Gabriel*, 263 F.3d at 108.

That approach to the first step of the *Landgraf* analysis is

fundamentally flawed. This Court has never held that Congress must speak unambiguously when it intends to apply a statue only prospectively. In *Landgraf*, "the presumption *against* retroactivity was reaffirmed in the traditional rule requiring *retroactive* application to be supported by a clear statement." *Lindh*, 521 U.S. at 325 (emphasis added). By requiring a similar "unambiguous" directive from Congress that INA § 241(a)(5) be prospective only, courts such as the Tenth Circuit below have turned the traditional clear-statement rule upside down. As this Court has recognized, *Landgraf* "referred to 'express command[s],' 'unambiguous directive[s],' and the like where it sought to reaffirm that clear-statement rule, *but only there*." *Ibid.* (emphasis added); see also *In re Minarik*, 166 F.3d 591, 598 (3d Cir. 1999) ("normal rules of statutory construction may apply to *remove* * * * the possibility of retroactivity" but "[n]othing short of an unambiguous directive * * * will justify giving a statute retroactive effect") (emphasis in original).

2. As noted above, courts that have rejected the statutory arguments for prospective application of INA § 241(a)(5) have interpreted this Court's decision in *St. Cyr* to require unambiguous congressional intent that the statute apply only prospectively. See, *e.g.*, Pet. App. 16a. That approach reflects a fundamental misunderstanding of this Court's decision: In *St. Cyr*, the Court considered whether IIRIRA § 304(b)—which narrowed the class of noncitizens eligible for discretionary relief from deportation and precluded such relief for noncitizens convicted of aggravated felonies—applied to someone who pleaded guilty to such a crime before IIRIRA's enactment. *St. Cyr*, 533 U.S. at 293-297. The government argued that Congress intended the provision to apply retroactively to all removals initiated after IIRIRA's effective date. The Court rejected that argument, and concluded that congressional intent regarding retroactivity was unclear and that application of § 304(b) to the petitioner would produce an impermissible retroactive effect.

In rejecting the government's interpretation of the statute in the first stage of the *Landgraf* analysis, the Court explained that, in order to apply *retroactively*, the statute must be "'so clear that it could sustain only one interpretation.'" *Id.* at 317 (quoting *Lindh*, 521 U.S. at 328 n.4). This "only one interpretation" standard "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 316. Thus, in light of the presumption against retroactive legislation, the Court held that "[a] statute may not be applied *retroactively* * * * absent a clear indication from Congress that it intended such a result." *Ibid.* (emphasis added); see also *Bowen*, 488 U.S. at 208 ("[C]ongressional enactments * * * will not be construed to have *retroactive* effect unless their language requires this result.") (emphasis added).

However, nothing in *St. Cyr* remotely suggests that Congress must speak "unambiguously" if it intends exclusively *prospective* application of a statute. There is no "potential unfairness" in such application and, thus, no need for courts to rely on any presumptions concerning congressional intent. The lower court's misapplication of *St. Cyr*'s clear-statement requirement fails to recognize that "the only 'presumption' mentioned in [*Landgraf*] is a general presumption *against* retroactivity." *Hughes Aircraft*, 520 U.S. at 950 (emphasis in original). *St. Cyr* simply applied, but did not expand upon, that basic presumption. Thus, this Court's retroactivity cases, including *St. Cyr*, "require[] an express congressional command only to overcome [the] presumption against retroactivity, not to ensure application of a statutory term prospectively." *Goncalves*, 144 F.3d at 129; see also, *e.g.*, *Scott* v. *Boos*, 215 F.3d 940, 947-948 (9th Cir. 2000) ("A negative inference may be used to apply a statute prospectively because there is no traditional presumption against applying a statute prospectively. Concerns about retroactive effect are not relevant and there is no requirement that Con-

gress clearly intended to have a statute apply prospectively.").

3. Not only was the Tenth Circuit's reliance on *St. Cyr* misplaced, but the court also ignored the implications of this Court's decision in *Lindh*, which held that Congress need not speak with the same unambiguous clarity to apply a statute exclusively to future conduct as it must when seeking to apply the statute to past conduct. The Court held that Congress intended chapter 153 of AEDPA, which addresses habeas petitions in non-capital state cases, to apply only prospectively to cases filed after AEDPA became effective. The Court observed that although AEDPA's chapter 153 contained no explicit statement regarding its temporal scope, Congress had explicitly provided that chapter 154, which addresses similar habeas claims in capital cases, "shall apply to cases pending on or after the date of enactment of this Act." 521 U.S. at 327. The Court explained that it "read [the provision] expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Ibid.*

Although it was able to draw a negative inference from Congress's silence on the scope of chapter 153, the *Lindh* Court did not conclude that the statute was entirely clear on the subject. Quite the contrary; the Court recognized that AEDPA "does not speak to the present issue with flawless clarity," but went on to "agree with Lindh that it tends to confirm the interpretation * * * that we adopt." *Id.* at 332. Indeed, the Court explained that the language prescribing the temporal scope of chapter 154 "may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way," but was sufficient to cause the Court to hold that Congress intended chapter 153 to apply only to cases filed after that provision became effective. *Id.* at 328-329. Ultimately, although recognizing problems with its

interpretation of the statute, the *Lindh* Court held that its conclusion "accords more coherence" to the statute than any other possible interpretation. *Id.* at 336. "That," said the Court, "is enough." *Ibid.*

As in *Lindh*, application of the normal rules of statutory construction leads to the conclusion that Congress intended INA § 241(a)(5) to apply only to those persons who illegally reentered the country after IIRIRA's effective date, and not to persons like petitioner who reentered more than 15 years before that date. Even if Congress's elimination of retroactivity language from the prior statutory provision, the legislative history of INA § 241(a)(5), and Congress's knowledge of the background legal principles against which it legislated do not "unambiguously" demonstrate congressional intent, by far the most plausible interpretation of the statute is that Congress meant it to apply only prospectively. Here, as in *Lindh*, "[t]hat is enough." 521 U.S. at 336.

II. Application Of INA § 241(a)(5) To Persons Who Reentered The United States Before April 1, 1997, Is Impermissibly Retroactive.

If, despite the foregoing analysis, this Court concludes that Congress has not "prescribed the statute's proper reach," then the Court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, "would operate retroactively," then the "traditional presumption" against retroactive legislation "teaches that it does not govern." *Ibid.* Because application of the reinstatement provision to persons who reentered the United States before that date would indeed increase penalties for the previously completed reentries and impair rights that these persons possessed when they acted, INA § 241(a)(5) may not be applied to such persons.

A. The relevant date for retroactivity analysis is the date of reentry.

Retroactivity analysis asks "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981)); see also *Union Pacific R.R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (a retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"). Thus, as Justice Scalia has observed, "[t]he critical issue" in retroactivity analysis is identifying "the relevant activity that the [statute in question] regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring); see also *Landgraf*, 511 U.S. at 270 (retroactivity analysis focuses on relationship between change in law and the "*relevant* past event") (emphasis added).

Here, the relevant activity is illegal reentry into the United States. Congress adopted IIRIRA because it found that "the ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border." H.R. REP. NO. 104-469(I), at 155. Thus, INA § 241(a)(5) specifies certain consequences if an "an alien * * * reenter[s] the United States illegally after having been removed or having departed voluntarily, under an order of removal." In particular, it provides that an illegal reentrant "is not eligible and may not apply for any relief" under the INA. Once someone has illegally reentered the United States after deportation, there is nothing the person can do thereafter to avoid the statute's consequences. It does not matter whether the individual marries a U.S. citizen, submits an application for adjustment of status, applies for suspension of deportation or voluntary departure, or performs any other act subsequent to reentry. Regardless of personal circum-

stances and subsequent conduct, if someone has illegally reentered the country, INA § 241(a)(5) mandates reinstatement without the possibility of discretionary relief.

Further evidence that reentry is the relevant conduct for purposes of retroactivity analysis comes from the criminal parallel to INA § 241(a)(5). Under the *Ex Post Facto* Clause, Congress may not impose criminal penalties on conduct antedating a statute. Recognizing this strict prohibition, Congress made clear, when amending the criminal provision concerning illegal reentries after deportation—the same conduct addressed by INA § 241(a)(5)—that although *deportations* antedating IIRIRA could serve as a factual predicate to the new provision's application, the new provision does not apply to illegal *reentries* antedating the Act. See IIRIRA § 324(c); note 15, *supra*. In drawing the line between reentry and deportation, Congress implicitly recognized that the critical conduct for purposes of retroactivity analysis is reentry.[16]

Accordingly, because illegal reentry is "the conduct which serves as the basis for the [reinstatement] proceeding," *Bejjani*, 271 F.3d at 677, it is the date of that act that constitutes the relevant "reference point," *Martin*, 527 U.S. at 363 (Scalia, J., concurring), for purposes of retroactivity analy-

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[16] The same considerations that undergird the *Ex Post Facto* Clause apply in the civil context. In fact, this Court has repeatedly relied on cases decided under the *Ex Post Facto* Clause when addressing questions of statutory retroactivity in the civil context. See, *e.g.*, *St. Cyr*, 533 U.S. at 317-318 (citing *Lindh*, 521 U.S. 320); *Hughes Aircraft*, 520 U.S. at 948 (citing *Collins* v. *Youngblood*, 497 U.S. 37 (1990); *Beazell* v. *Ohio*, 269 U.S. 167 (1925)); *Landgraf*, 511 U.S. at 266-267, 269 n.23 (citing *Weaver*, 450 U.S. 24; *Miller*, 482 U.S. 423). Because of the *Ex Post Facto* Clause, Congress could not have applied IIRIRA § 324(c) to reentries antedating the Act. Although Congress could have made INA § 241(a)(5) apply retroactively had it done so *explicitly*, it did not in fact do so.

sis.[17]

B. Application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, attaches new legal consequences to past conduct.

1. Application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, is categorically precluded because it would abolish the right of reentrants to pursue various types of relief that they could seek before that date.

Applying INA § 241(a)(5) to an individual who, after being deported, reentered the United States when relief from renewed deportation was available to illegal reentrants would "impair rights" the person "possessed when he acted" and "increase" his "liability for past conduct." *Landgraf*, 511 U.S. at 280. As a result, retroactive application of that provision is precluded absent express congressional mandate.

INA § 241(a)(5) abolishes certain substantive rights noncitizens possessed before IIRIRA's effective date, April 1, 1997. Specifically, before IIRIRA took effect, individuals who unlawfully reentered the United States after having previously been deported had the right to seek various forms of discretionary relief that, if granted, would have allowed them to legalize their status in the country or avoid renewed deportation.

For example, before IIRIRA, an illegal reentrant could—either proactively or as a defense to deportation—apply for

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[17] See, *e.g.*, *Avila-Macias*, 328 F.3d at 114 (application of IIRIRA to someone who reentered after statute's effective date "does not have an impermissible retroactive effect *because the consequences of an illegal reentry at the time that he reentered* are the consequences he faces now") (emphasis added); *Alvarez-Portillo*, 280 F.3d at 861 ("the substantive defenses to removal eliminated by § 241(a)(5) may not be retroactively denied to aliens *who illegally reentered prior to enactment*") (emphasis added).

an adjustment of status (and the requisite waiver of the prior deportation order). See 8 U.S.C. § 1255(a), (i) (1996); 8 C.F.R. §§ 212.2, 245.1, 245.2, 245.10 (1997); *Arevalo*, 344 F.3d at 5 (under the pre-IIRIRA regime "[e]ven those reentering the United States illegally could seek such an adjustment"); *Alvarez-Portillo*, 280 F.3d at 862 (before IIRIRA took effect "aliens in deportation proceedings were allowed to avoid removal by seeking and obtaining an adjustment of status to lawful permanent resident").

Similarly, before IIRIRA, a person placed in deportation proceedings could seek "suspension of deportation" (and thus obtain permanent residency), request "voluntary departure" (and thus avoid entry of a deportation order), or apply for asylum—notwithstanding the fact that the person had reentered the country unlawfully. See 8 U.S.C. §§ 1158(a), 1254(a)(1), (e)(1) (1996); 8 C.F.R. § 244.1 (1997); *Dinnall* v. *Gonzales*, 421 F.3d 247, 260-261 (3d Cir. 2005) (noting that person who reentered United States before IIRIRA could have applied for voluntary departure under law in effect at time of reentry).

INA § 241(a)(5), however, provides that an illegal reentrant "is not eligible and may not apply for any relief" under the Immigration and Nationality Act. As a result, a person subject to INA § 241(a)(5) can neither apply for nor receive adjustment of status, cancellation of removal,[18] asylum, or voluntary departure. Consequently, the government's application of INA § 241(a)(5) to those who reentered the United States when such forms of relief were still available to illegal reentrants "impairs vested rights acquired under existing laws" and "attaches a new disability, in respect to transactions or considerations already past," *Landgraf*, 511 U.S. at

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[18] IIRIRA "replaced 'suspension of deportation' with 'cancellation of removal,'" its functional equivalent. *Tang* v. *INS*, 223 F.3d 713, 718 (8th Cir. 2000); see also page 40, *infra* (discussing differences between the two).

269 (citation and internal quotation marks omitted), thus giving the statute an impermissible retroactive effect. See *St. Cyr*, 533 U.S. at 321.

As this Court recognized in *Martin*, "[t]he inquiry into whether a statute operates retroactively demands a common-sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270). Here, there can be no doubt that the government's retroactive application of INA § 241(a)(5) to persons who unlawfully reentered the country before IIRIRA's effective date attaches new legal consequences to their completed reentries. As a result, retroactive application is precluded under *Landgraf*.

2. *Application of INA § 241(a)(5) to petitioner would deprive him of specific rights he possessed under prior law.*

Even if retroactive application of INA § 241(a)(5) were not categorically precluded because it deprives individuals of the possibility of relief that had existed pre-IIRIRA, application as to petitioner would violate *Landgraf* because, but for the application of INA § 241(a)(5), he was and still would be entitled to seek, and have the opportunity to receive, multiple forms of discretionary relief.

a. At all times since his reentry into the country, petitioner has been eligible for at least some form of discretionary relief. From the moment he entered, he was entitled to seek, and eligible to receive, voluntary departure. From 1989 onward, he was also entitled to seek, and eligible to receive, suspension of deportation (or its replacement, cancellation of removal). And since his 2001 marriage, he was additionally entitled to seek, and eligible to receive, adjustment of status. But for the retroactive application of INA § 241(a)(5), petitioner would remain eligible for each of these forms of relief.

Voluntary departure. Petitioner would be eligible for the

defense of voluntary departure *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1229c. Voluntary departure confers significant benefits on an individual as compared to deportation or removal. See *Dinnall*, 421 F.3d at 260; *Alimi* v. *Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004); *Contreras-Aragon* v. *INS*, 852 F.2d 1088, 1090 (9th Cir. 1988). The benefits of voluntary departure generally include the ability to determine the time and manner of one's departure from the United States, and the ability to select a preferred destination. See *Bocova* v. *Gonzales*, 412 F.3d 257, 265 (1st Cir. 2005). Moreover, a person granted voluntary departure is usually not detained before leaving the United States, whereas a person subject to deportation is frequently jailed during the period before deportation (as petitioner was here, for nearly a year). See *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). But the greatest benefit to an individual granted voluntary departure is that he may, after departure, proceed to a U.S. consulate in his home country and, if otherwise eligible, immediately seek readmission to the United States. By contrast, a person deported or removed from the United States must wait many years—5 years under pre-IIRIRA law and up to 20 years under current law—before seeking readmission. See 8 U.S.C. § 1182(a)(6)(B) (1996); 8 U.S.C. § 1182(a)(9)(A)(ii); *Dinnall*, 421 F.3d at 260; *Bocova*, 412 F.3d at 265 n.1; *Alimi*, 391 F.3d at 892. Thus, because petitioner was removed under the government's flawed interpretation of INA § 241(a)(5), he purportedly is now inadmissible for at least 20 years. A.R. 3.

Cancellation of removal. Petitioner would be eligible for the defense of cancellation of removal (which replaced suspension of deportation) *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1229b(b). Had he been given an opportunity to apply for, and had he obtained, cancellation of removal (or suspension of deportation), petitioner's status would have been adjusted to that of lawful permanent resident.

As discussed above (at note 18), pre-IIRIRA suspension of deportation and post-IIRIRA cancellation of removal are functional equivalents. See *Tang*, 223 F.3d at 718. Though the respective standards are different, the differences are irrelevant here; petitioner would be eligible for relief under either regime.

Before IIRIRA's enactment, an individual placed into deportation proceedings was eligible for suspension of deportation if he had seven years continuous presence in the United States, was of good moral character, and could demonstrate "extreme hardship" to either himself or a U.S.-citizen child or spouse. See 8 U.S.C. § 1254(a)(1) (1996). After IIRIRA's enactment, such a person is eligible for cancellation of removal if he has ten years continuous presence in the United States, is of good moral character, and can demonstrate "exceptional and extremely unusual hardship" to a U.S.-citizen child or spouse. See 8 U.S.C. § 1229b(b).

Petitioner satisfies each of these criteria: He reentered the United States "shortly after his last deportation in October of 1981" and—until his removal during the course of these proceedings—"lived in this country ever since." Pet. App. 3a. Petitioner, who was never arrested for any crime in the twenty-one years following his reentry, is married to a U.S. citizen and has a U.S.-citizen son who was born in 1989. Pet. App. 3a; A.R. 11-15, 23, 42. His wife, a "homemaker with few job skills," and his asthmatic son are dependent upon him for financial support and, having been deprived of his earnings, were on the verge of losing the family home until anonymous donors paid off their mortgage earlier this week. See D. Romboy, *Yes! Home For Christmas: 3 Donors Pay Off Mortgage For Wife Of Deported Man*, DESERET MORNING NEWS, Dec. 22, 2005, at A1, *available at* http://deseretnews.com; D. Romboy, *No Home For The Holidays*, DESERET MORNING NEWS, Dec. 17, 2005, at A1, *available at* http://deseretnews.com; see also Romboy, *Outcast in Mexico*, at A1. Thus, based on his two decades of continuous pres-

ence in the United States, good moral character, and the "extreme and exceptionally unusual" hardship to his U.S.-citizen wife and child, petitioner would be eligible for cancellation of removal today, and was eligible for suspension of deportation as of 1989—but for application of INA § 241(a)(5).

Adjustment of status. Petitioner is married to a U.S. citizen, who applied for an immediate-relative visa on his behalf. Pet. App. 3a & n.5. Based on his wife's visa application and his submission of a Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, *ibid.*, petitioner would be entitled to apply for adjustment of status and, if granted, become a legal permanent resident *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1255(a), (i); 8 C.F.R. §§ 212.2, 212.7, 245.1, 245.2, 245.10. Indeed, not only would petitioner be entitled to apply for adjustment of status, but "his marriage would have made him *a likely candidate* for adjustment of status" but for application of INA § 241(a)(5). *Alvarez-Portillo*, 280 F.3d at 862 (emphasis added).[19]

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[19] Petitioner submitted an application for adjustment of status on April 30, 2001, notwithstanding INA § 241(a)(5). Pet. App. 3a; A.R. 46. The government argued below that petitioner's application was denied. Pet. App. 4a. But the purported denial was neither signed nor provided to petitioner (*ibid.*), and the government has expressly disavowed any reliance on the purported denial in this Court. U.S. Cert. Resp. 5 n.2. Moreover, even if petitioner's affirmative application for adjustment of status had in fact been denied, that would not resolve this case. Under prior law, petitioner would have been entitled to renew a previously denied application for adjustment of status if he were subsequently placed in deportation proceedings. See 8 C.F.R. § 245.2(a)(5)(ii) (1997); *Lopez-Flores* v. *Dep't of Homeland Sec.*, 387 F.3d 773, 776-777 (8th Cir. 2004) (holding application of § 241(a)(5) impermissibly retroactive even when alien had already applied for and been denied adjustment of status because, "absent the § 241(a)(5) provisions, [petitioner] would have had the opportunity to renew his applica-

b. The court of appeals rejected the argument that application of INA § 241(a)(5) to petitioner would be impermissibly retroactive, on the grounds that petitioner's marriage "did not occur until 2001" and that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." Pet. App. 17a & n.12. In so holding, the court of appeals focused on the wrong event for purposes of retroactivity analysis. As we explained above (see Part II.A), INA § 241(a)(5) regulates reentry, not marriage, and thus the relevant event for present purposes is petitioner's reentry, not his marriage. Because application of INA § 241(a)(5) would attach a new legal consequence—ineligibility for discretionary relief—to an event—petitioner's reentry—that was completed before the statute's enactment, its application to petitioner is impermissibly retroactive.

That petitioner was not yet eligible as of April 1, 1997, to apply for adjustment of status does not obviate the fact that he was at all points subsequent to his 1982 reentry and before April 1, 1997, eligible for *some* form of relief (to wit, voluntary departure and, as of 1989, suspension of deportation). Nor does it obviate the fact that preventing him from applying for the additional relief to which he is now otherwise eligible, *i.e.* adjustment of status, "attaches new legal consequences to events completed before [IIRIRA's] enactment." *Landgraf*, 511 U.S. at 269-270. If, as the government contends, INA § 241(a)(5) precludes petitioner from receiving "any relief" under the Immigration and Nationality Act,

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tion for adjustment of status in the context of a subsequent deportation proceeding"); *Randall* v. *Meese*, 854 F.2d 472, 474-475 (D.C. Cir. 1988) ("Should the alien fail to gain adjustment [in his initial application], he is entitled to a *de novo* review of his application in the context of deportation proceedings."). By subjecting petitioner to reinstatement without an opportunity to pursue relief, INA § 241(a)(5) deprived petitioner of the right to renew his adjustment application, if denied, before an immigration judge in removal proceedings.

he would no longer be entitled to seek suspension of deportation or voluntary departure, although he was entitled to apply for both before April 1, 1997.[20]

The fact that suspension of deportation and voluntary departure would be *defenses* to deportation in no way suggests that these are not relevant for purposes of retroactivity analysis. As this Court held unanimously in *Hughes Aircraft*, "eliminat[ion of] a defense" previously available is barred by the "presumption against retroactivity" because it "attach[es] a new disability, in respect to transactions or considerations already past." 520 U.S. at 948 (internal quotations omitted); see also *St. Cyr*, 533 U.S. at 321 (holding same with respect to elimination of § 212(c) relief, which had offered defense to removal). Thus, as the Eighth Circuit concluded with respect to someone who had reentered the United States before IIRIRA's effective date but had not affirmatively sought relief before being placed in reinstatement proceedings after IIRIRA's effective date, application of INA § 241(a)(5) "had an impermissible retroactive effect" because the reentrant "had a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding," and "§ 241(a)(5) as applied by the INS has now deprived him of that defense." *Alvarez-Portillo*, 280 F.3d at 867.

Thus, even if retroactivity analysis were properly confined to a narrow comparison of, on the one hand, the relief immediately available to petitioner the instant before IIRIRA took effect and, on the other hand, the relief immediately available to petitioner the instant after IIRIRA took effect, it

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[20] Moreover, under the law as it stood before April 1, 1997, petitioner would have been eligible to apply for adjustment of status upon marriage to his long-time, U.S.-citizen partner, with whom he was raising their U.S. citizen child. Thus, petitioner had a "reasonable[] * * * expectation that the opportunity to pursue such a defense would be available to him in later instituted deportation proceedings." *Lopez-Flores*, 387 F.3d at 776.

is clear that INA § 241(a)(5) "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31.

c. Finally, even if the inquiry were limited to whether petitioner was entitled to seek, and eligible to receive, discretionary relief at the time of his 1982 illegal reentry, application of INA § 241(a)(5) to petitioner would still deprive him of relief to which he then was entitled—voluntary departure. See 8 U.S.C. § 1254(e)(1) (1982). Furthermore, the fact that petitioner could expect to *become* eligible for other relief over time, by, for example, living in the United States for the requisite period and demonstrating good moral character (the prerequisites for suspension of deportation) or by marrying a U.S. citizen (the prerequisite for adjustment of status), itself demonstrates that retroactive application of INA § 241(a)(5) to petitioner would violate *Landgraf*.

C. The fact that the relief available to petitioner before IIRIRA was discretionary is irrelevant for purposes of retroactivity analysis.

Allowing someone otherwise subject to removal the opportunity to apply for discretionary relief gives that person a chance to avoid removal. And as this Court has previously recognized, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325 (citing *Hughes Aircraft*, 520 U.S. at 949; *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937)). Thus, the fact that a particular form of "relief is discretionary does not affect" the conclusion that denial of the opportunity to seek such relief is impermissibly retroactive. *Ibid.*; see also *Sarmiento Cisneros*, 381 F.3d at 1284 ("That adjustment of status relief is discretionary does not defeat Sarmiento's argument that section 1231(a)(5) has an impermissible retroactive effect when applied to him."); *Arevalo*, 344 F.3d at 15 ("Contrary to the INS's position, we do not think it is significant that adjustment of status is a discretionary form of relief.").

Although there was no guarantee that discretionary relief would in fact be granted, a person who reentered the United States before IIRIRA's effective date nonetheless had a well-established right to *seek* such relief. Accordingly, applying INA § 241(a)(5) to deny a person who reentered the United States before IIRIRA's effective date the opportunity to obtain an otherwise available form of discretionary relief is an impermissibly retroactive denial of "a substantive right." *Arevalo*, 344 F.3d at 14; see also *id.* at 15 ("A right to seek relief is analytically separate and distinct from a right to the relief itself. Consequently, an alien is not precluded from having a vested right in a form of relief merely because the relief itself is ultimately at the discretion of the Executive Branch."); (citations omitted); *Lopez-Flores*, 387 F.3d at 776 ("the fact that Lopez-Flores may have been a weaker candidate than Alvarez-Portillo for discretionary adjustment of status does not change the fact that he had a reasonable expectation that such a defense would be available to him to assert in a subsequent deportation proceeding").

D. Petitioner is not required to demonstrate reliance on prior law in order to establish impermissible retroactivity.

Before IIRIRA, petitioner and others similarly situated, when deciding whether to reenter the United States, can reasonably be expected to have known that they either were eligible or could become eligible to legalize their status in the United States after reentry. Leaving behind family and friends and all that is familiar to establish a new life in a foreign land is not easy. It requires a significant investment of economic and emotional resources. Given the ever-present danger of deportation, the investment is a highly risky one. The availability of a possible defense to deportation—via adjustment of status, suspension of deportation, or some other form of discretionary relief—reduces that risk appreciably. The possibility of relief means that someone who, subsequent to reentry, gets married, has children, and otherwise builds a

stable and productive life in America need not fear certain deportation and the concomitant loss of all that he or she has achieved. Cf. *St. Cyr*, 533 U.S. at 325 (noting the "clear difference" between possible and certain deportation).

Accordingly, before IIRIRA the availability of discretionary relief may well have affected the calculus of a person contemplating reentry after deportation. See *Dinnall*, 421 F.3d at 262 ("It is not unreasonable to assume that many of these aliens may well have reentered the country with the understanding that they might be eligible for some form of discretionary relief."). Stated differently, someone such as petitioner is likely to have relied on the immediate or potential availability of discretionary relief when choosing to reenter the United States. The bar to such relief subsequently imposed by INA § 241(a)(5) is therefore "the type of legal change that would have an impact on private parties' planning." *Landgraf*, 511 U.S. at 282.

That said, petitioner need not demonstrate that he himself relied on prior law in order to prove that the application of INA § 241(a)(5) to him would be impermissibly retroactive. As the Third Circuit has observed, this Court "has never required actual reliance or evidence thereof in the *Landgraf* line of cases, and has in fact assiduously eschewed an actual reliance requirement." *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004). Simply put, "[t]he likelihood that the party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity." *Id.* at 493; see also *Olatunji*, 387 F.3d at 389 ("we do not believe that subjective reliance is, or ought to be, relevant to the question of whether a particular statute is impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor related to the presumption of congressional intent underlying the bar against retroactivity"). Indeed, "no form of reliance is necessary" because requiring proof of "reliance (whether subjective or objective)" would "all but turn the presumption against retroactivity on its head." *Id.* at 388-

389. "Whether a plaintiff did or did not rely on a prior statutory scheme is irrelevant to whether that scheme in fact has a retroactive effect on that plaintiff." *Id.* at 391.[21]

Landgraf and its progeny also make clear that reliance need not be proven to establish impermissible retroactivity. *Landgraf* held that a statute allowing compensatory and punitive damages where none had previously been allowed could not be applied retroactively to conduct pre-dating the statute, even though the discriminatory conduct upon which such damages would have been based was already unlawful at the time it occurred. See 511 U.S. at 281-283.[22] The Court reached this conclusion despite there being no evidence that the defendant, which was sued on a *respondeat superior* theory, had in any way relied on the absence of such damages when designing and implementing its internal training and control mechanisms. See *id.* at 280-293. Similarly, in *Hughes Aircraft* this Court held that a statute eliminating a previously accepted defense to *qui tam* actions brought under the False Claims Act could not be applied retroactively even though the conduct at issue was illegal when it occurred and could have resulted in equally large damages if the government, rather than a private relator, had initiated the action. In so holding, the Court did not even discuss, let alone require, reliance. See 520 U.S. at 946-952.

Even *St. Cyr*—which is often cited by the government in

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[21] Because petitioner was subjected to INA § 241(a)(5), he was denied any opportunity to demonstrate actual reliance—or, for that matter, to present evidence that he was eligible for and in fact likely to have received discretionary relief from removal.

[22] *Landgraf*, like *Hughes Aircraft* and *St. Cyr*, makes clear that even persons who break the law are entitled to protection from the retroactive application of statutes that attach new legal consequences to past conduct. See *Landgraf*, 511 U.S. at 282 n.35 ("Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past.").

support of the proposition that reliance must be proven (see, *e.g.*, Supplemental Brief for Respondent, 2002 WL 32355572, at *3, *Chambers* v. *Ashcroft*, 307 F.3d 284 (4th Cir. 2002) (No. 00-6364))—demonstrates that retroactivity analysis entails a categorical approach that disregards a particular petitioner's actual reliance on prior law. In *St. Cyr*, the Court held that it was impermissibly retroactive to eliminate the possibility of relief under INA § 212(c) for persons who had pled guilty to an offense but who, notwithstanding their conviction, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. In reaching this result, the Court did not determine (and did not invoke a lower court finding) that St. Cyr himself had actually relied on the possibility of § 212(c) relief when entering his plea. Rather than focus on St. Cyr in particular, the Court adopted a categorical approach, speaking not of St. Cyr individually but of "defendants * * * in St. Cyr's position," 533 U.S. at 323, and of "other aliens like him." *Id.* at 325. Notably, the holding in *St. Cyr* is not limited either to the particular litigant before the court or to those who could demonstrate actual reliance on the prior law. Instead, the prohibition on retroactive elimination of § 212(c) relief extends to *all* persons who had been eligible for such relief at the time of their guilty plea, without regard for individual reliance.

Thus, the question whether petitioner actually relied on pre-IIRIRA law is irrelevant to the determination whether applying INA § 241(a)(5) to him would be impermissibly retroactive. Because actual reliance need not be proven, such a demonstration is unnecessary, particularly when it is probable that, "as a general matter," *St. Cyr*, 533 U.S. at 322, "the *class* of aliens who chose to illegally reenter the United States prior to the enactment of § 241(a)(5)," *Dinnall*, 421 F.3d at 262 (emphasis added), did so on the reasonable expectation that discretionary relief from deportation would be available to them.

E. Retroactive application of INA § 241(a)(5) to petitioner is inequitable.

This Court has long recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan*, 333 U.S. at 10. Because deportation, like punitive damages, "share[s] key characteristics of criminal sanctions," *Landgraf*, 511 U.S. at 281, its "retroactive imposition * * * would raise a serious constitutional question." *Ibid.* (citing, *inter alia*, *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.")).

Indeed, it is well-settled that "retroactive statutes"—even purely civil ones—"raise particular concerns." *Landgraf*, 511 U.S. at 266. That is especially true when, as here, the statute in question targets noncitizens. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Ibid.*; see also *St. Cyr*, 533 U.S. at 315 (same). "[B]ecause noncitizens cannot vote, they are particularly vulnerable to adverse legislation." *Id.* at 315 n.39 (quoting S. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)). Accordingly, this Court has repeatedly recognized the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449). This principle is fully applicable here. See Part I.A.4, *supra*.

In light of the result in *St. Cyr*, moreover, it would be particularly inequitable if INA § 241(a)(5) were retroactively applied to petitioner and those in his position. *St. Cyr* held that the availability of discretionary relief from deportation may not be withheld retroactively from persons who were convicted, by guilty plea, of crimes that are now deemed to be aggravated felonies. St. Cyr himself was convicted of drug

trafficking. By contrast, petitioner's only crime is having entered the United States without inspection. To be sure, illegal reentry is a serious matter. Once here, however, petitioner conducted himself in an exemplary fashion, so much so that he would have been eligible to apply for several distinct forms of immigration relief but for the government's application of INA § 241(a)(5) to him. In over twenty years of living in the United States, he was never arrested for any reason. A.R. 11-15. On the contrary, he constructed a stable, law-abiding life in which he built a business, married a U.S. citizen, and raised a U.S.-citizen son. Pet. App. 3a; A.R. 20, 23, 42; see also Romboy, *Outcast in Mexico*, at A1. It would be ironic indeed if petitioner were denied that which St. Cyr received. Retroactively depriving petitioner of the opportunity to seek and receive the discretionary relief available from the time of his reentry through the date IIRIRA took effect would "undoubtedly impose * * * a 'new disability' in respect to past events." *Landgraf*, 511 U.S. at 283.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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CURRENT STATUTES

8 U.S.C. § 1182(a)(9)(A)(ii) (2005) provides:

> Any alien not described in clause (i) who—
>
> (I) has been ordered removed under section 240 or any other provision of law, or
>
> (II) departed the United States while an order of removal was outstanding,
>
> and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

8 U.S.C. § 1229b(b)(1) (2005) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of

the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229c(a)(1) (2005) provides:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

8 U.S.C. § 1255(a) (2005) provides in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(i) (2005) provides in relevant part:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—
>
> (A) who—
>
> (i) entered the United States without inspection;
>
> * * *
>
> (B) who is the beneficiary * * * of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001;

* * *

and

(C) who, in the case of a beneficiary of a petition for classification * * * is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

PRE-IIRIRA STATUTES

8 U.S.C. § 1158(a) (1996), repealed by IIRIRA § 604(a), provided:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1182(a)(6)(B) (1996), repealed by IIRIRA § 301(b)(1), provided in relevant part:

Any alien who

(i) has been arrested and deported,

* * *

and * * * who seeks admission within 5 years of the date of such deportation or removal * * * is excludable, unless before the date of the alien's embarkation or reembarkation at a place outside the United States or attempt to be admitted from foreign

> contiguous territory the Attorney General has consented to the alien's applying or reapplying for admission.

8 U.S.C. § 1254(a) (1996), repealed by IIRIRA § 308(b)(7), provided in relevant part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

8 U.S.C. § 1254(e)(1) (1982), amended by subsequent law, provided in relevant part:

> The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 1251(a) of this title * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall

> establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e)(1) (1996), repealed by IIRIRA § 308(b)(7), provided in relevant part:

> Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3) or (4) of section 1251(a) of this title * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1255(a) (1996), amended by Pub. L. 106-386 § 1506(a)(1)(A), 114 Stat. 1464 (2000), provided in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(i) (1996), amended by IIRIRA § 376(a), provided in relevant part:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States who—
>
> (A) entered the United States without inspection
>
> * * *
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

IIRIRA

IIRIRA § 212(e), Pub. L. No. 104-208 § 212(e), provides:

> EFFECTIVE DATE.—Section 274C(f) of the Immigration and Nationality Act, as added by subsection (b), applies to the preparation of applications before, on, or after the date of the enactment of this Act.

IIRIRA § 322(c), Pub. L. No. 104-208 § 322(c), provides:

> EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act. Subparagraphs (B) and (C) of section 240(c)(3) of the Immigration and Nationality Act, as inserted by section 304(a)(3) of this division, shall apply to proving such convictions.

IIRIRA § 342(b), Pub. L. No. 104-208 § 342(b), provides:

> EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to incitement regardless of when it occurs.

IIRIRA § 347(c), Pub. L. No. 104-208 § 347(c), provides:

> EFFECTIVE DATE.—The amendments made by this section shall apply to voting occurring before, on, or after the date of the enactment of this Act.

IIRIRA § 348(b), Pub. L. No. 104-208 § 348(b), provides:

> EFFECTIVE DATE.—The amendment made by subsection (a) shall be effective on the date of the enactment of this Act and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date.

IIRIRA § 351(c), Pub. L. No. 104-208 § 351(c), provides:

> EFFECTIVE DATE.—The amendments made by this section shall apply to applications for waivers filed before, on, or after the date of the enactment of this Act, but shall not apply to such an application for which a final determination has been made as of the date of the enactment of this Act.

CURRENT REGULATIONS

8 C.F.R. § 212.2(e) provides:

> An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

8 C.F.R. § 212.7(a)(1)(ii) provides:

> An applicant for adjustment of status who is excludable and seeks a waiver under section 212(h) or (i) of the Act shall file an application on Form I-601 with the director or immigration judge considering the application for adjustment of status.

8 C.F.R. § 245.1 provides in relevant part:

> (a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. * * *
>
> (b) Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and § 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in § 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:
>
> * * *
>
> (3) Any alien who was not admitted or paroled following inspection by an immigration officer[.]

8 C.F.R. § 245.2(a)(3)(iii) provides:

> An alien who seeks adjustment of status under the provisions of section 245(i) of the Act must file Form I-485, with the required fee. The alien must

also file Supplement A to Form I-485, with any required additional sum.

8 C.F.R. § 245.10 provides in relevant part:

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary * * * of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed[.]

* * *

(b) Eligibility. An alien who is included in the categories of restricted aliens under § 245.1(b) and meets the definition of a "grandfathered alien" may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs (b)(1) through (b)(7) of this section:

(1) Is physically present in the United States;

(2) Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;

(3) Is not inadmissible from the United States under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;

(4) Properly files Form I-485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the required fee for that application;

(5) Properly files Supplement A to Form I-485 on or after October 1, 1994;

(6) Pays an additional sum of $1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and

(7) Will adjust status under section 245 of the Act to that of lawful permanent resident of the United States on or after October 1, 1994.

PRE-IRRIRA REGULATIONS

8 C.F.R. § 212.2(e) (1997) provided:

Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

8 C.F.R. § 244.1 (1982) provided in relevant part:

Pursuant to Part 242 of this chapter and section 244 of the Act an immigration judge may authorize the suspension of an alien's deportation; or, if the alien establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation[.]

8 C.F.R. § 244.1 (1997) provided in relevant part:

Pursuant to Part 242 of this chapter and section 244 of the Act an immigration judge may authorize the suspension of an alien's deportation; or, if the alien

> establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation[.]

8 C.F.R. § 245.1 (1997) provided in relevant part:

> (a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. * * *
>
> (b) Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and s 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in s 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:
>
> * * *
>
> (3) Any alien who was not admitted or paroled following inspection by an immigration officer[.]

8 C.F.R. § 245.2(a)(3)(iii) (1997) provided:

> An alien who seeks adjustment of status under the provisions of section 245(i) of the Act must file Form I-485, with the required fee. The alien must

also file Supplement A to Form I-485, with any required additional sum.

8 C.F.R. § 245.2(a)(5)(ii) (1997) provided in relevant part:

> No appeal lies from the denial of an application [for adjustment of status] by the director, but the applicant retains the right to renew his or her application in proceedings under Part 242 of this chapter[.]

8 C.F.R. § 245.10 (1997) provided:

> (a) Eligibility. Any alien who is included in the categories of restricted aliens under s 245.1(b) may apply for adjustment of status under section 245 of the Act if the alien:
>
> (1) Is physically present in the United States;
>
> (2) Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;
>
> (3) Is not excludable from the United States under any provision of section 212 of the Act, or all grounds for excludability have been waived;
>
> (4) Properly files Form I-485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the fee required for that application;
>
> (5) Properly files Supplement A to Form I-485 on or after October 1, 1994;
>
> (6) Pay an additional sum of five times the fee required for filing Form I-485, unless payment of the additional sum is waived under section 245(i) of the Act; and
>
> (7) Will adjust status under section 245 of the Act to that of a lawful permanent resident of the United

States on or after October 1, 1994, and before October 1, 1997.

(6)

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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 8 U.S.C. 1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally reentered the United States, applies to an alien whose illegal reentry predated the effective date of the provision.

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. This case involves the reinstatement of a previous order of deportation pursuant to 8 U.S.C. 1231(a)(5). The immigration laws have long provided for reinstatement of a previous order of deportation against an alien who illegally reenters the country after having been deported. As originally enacted in 1950, the reinstatement provision stated as follows:

> Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance.

Internal Security Act of 1950, § 23, 64 Stat. 1012 (8 U.S.C. 156(d) (1946 & Supp. V 1952)). Section 23 of the Internal Security Act, which enacted that provision, also made other revisions to the rules governing deportation of aliens. Congress's intent in those amendments, including the reinstatement provision, was "to provide more effective control over, and to facilitate the deportation of, deportable aliens." H.R. Conf. Rep. No. 3112, 81st Cong., 2d Sess. 59 (1950).

The reinstatement authority was limited to particular categories of aliens who had illegally reentered the country, including aliens whose deportation was based on their involvement in narcotics trafficking, crimes of moral turpitude, or subversive activity. See 64 Stat. 1012 (adding 8 U.S.C. 156(c)). Deportation of other illegal reentrants was conducted pursuant to the provisions governing deportation of aliens generally. See 8 U.S.C. 155 (1946 & Supp. V 1952).

When Congress comprehensively revised the immigration laws in the Immigration and Nationality Act of 1952 (INA), it reenacted the reinstatement provision in revised form. § 242(f), 66 Stat. 212 (8 U.S.C. 1252(f) (1994)). The reinstatement provision enacted by the INA, as codified, stated:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952 [the enactment date of the INA], on any ground described in any of the paragraphs enumerated in subsection (e) of this

> section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C. 1252(f) (1994). The reinstatement authority under that provision remained confined to certain categories of illegal reentrants, including aliens who had committed specified crimes, had falsified documents, or had endangered national security. See *ibid.*; 8 U.S.C. 1252(e) (1994).

The reinstatement provision remained unchanged until 1996, when Congress again enacted comprehensive revisions to the immigration laws in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA repealed the former reinstatement provision and replaced it with a new Section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5). IIRIRA § 305(a)(3), 110 Stat. 3009-599. That provision, which remains unchanged, states:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5).

That provision differs from the previous reinstatement statute in three principal respects. First, the reinstatement authority now extends to all illegal reentrants. Second, the

reinstatement provision now makes explicit that an illegal reentrant's previous order of removal is not subject to reopening or review. Finally, and of principal relevance here, an illegal reentrant whose previous order of removal is reinstated now is "not eligible and may not apply for any relief." 8 U.S.C. 1231(a)(5).[1] Under the predecessor reinstatement provision, by contrast, an illegal reentrant retained eligibility to seek discretionary relief from deportation to the same extent as other deportable aliens. See Pet. App. 10a-11a.[2]

2. Petitioner, a citizen of Mexico, was deported from the United States in October 1981. Although petitioner had been deported on a number of previous occasions, he had illegally returned to the United States each time. In January 1982, petitioner again illegally reentered the United States without inspection. On April 1, 1997, the new reinstatement provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), became effective. Pet. App. 3a, 19a; see IIRIRA § 309(a), 110 Stat. 3009-625.

On March 30, 2001, nearly four years after IIRIRA's effective date, petitioner married a United States citizen. On May 30, 2001, petitioner filed an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). Petitioner also filed an application to adjust his status to that of lawful permanent resi-

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[1] Section 1231(a)(5) bars only various forms of discretionary relief. The alien remains eligible for withholding of removal under 8 U.S.C. 1231(b)(3), and for withholding or deferral of removal under the Convention Against Torture. See 8 C.F.R. 208.31, 241.9(e).

[2] The administration of the current reinstatement provision also differs from that of the former provision in that, under the regulations implementing the current provision, an alien no longer has a right to a hearing before an immigration judge. See 8 C.F.R. 241.8(a). Petitioner's argument that Section 1231(a)(5) has a retroactive effect is limited to the provision's elimination of eligibility for discretionary relief from removal. Petitioner does not contend that the other changes brought about by Section 1231(a)(5) raise retroactivity concerns. See Pet. 19 n.15.

dent based on a relative visa petition filed on his behalf by his wife. See 8 U.S.C. 1255(i). On November 7, 2003, the Department of Homeland Security (DHS) issued a notice of its intent to reinstate petitioner's prior deportation order pursuant to 8 U.S.C. 1231(a)(5) on the basis that petitioner had illegally reentered the United States after having been removed. On November 17, 2003, DHS entered an order reinstating petitioner's prior deportation order pursuant to Section 1231(a)(5), and also issued a warrant for petitioner's arrest and removal. Pet. App. 3a-4a, 19a-28a.

3. Petitioner sought review in the court of appeals of the reinstatement of his prior deportation order. Petitioner argued that, because he had illegally reentered the country before IIRIRA's effective date, the application against him of the current reinstatement provision, 8 U.S.C. 1231(a)(5), was impermissibly retroactive. Petitioner contended that he instead was subject to the previous reinstatement provision, 8 U.S.C. 1252(f) (1994), under which he would have retained eligibility to apply for adjustment of status. The government argued that application of Section 1231(a)(5) to petitioner has no retroactive effect, and that the provision renders petitioner ineligible to apply for discretionary relief from removal, including adjustment of status. Pet. App. 4a-5a.

The court of appeals denied the petition for review, holding that Section 1231(a)(5)—including its bar against discretionary relief from removal—applies to aliens whose illegal reentry predated IIRIRA's effective date. Pet. App. 1a-18a. The court explained that, under the retroactivity framework established by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the threshold question is whether Congress prescribed the temporal reach of Section 1231(a)(5). See Pet. App. 11a-12a. The court held that Congress had not prescribed with requisite specificity whether Section

1231(a)(5) applies to aliens who had illegally reentered the country before the provision's effective date. *Id.* at 14a-16a.

The court of appeals therefore turned to the second step of the *Landgraf* inquiry, and addressed whether application of Section 1231(a)(5) to petitioner would have a "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see Pet. App. 16a. The court emphasized that, while petitioner's illegal reentry predated IIRIRA's effective date, petitioner had neither married nor applied for adjustment of status by that date. *Id.* at 17a. In those circumstances, the court reasoned, petitioner "had no protectable expectation of being able to adjust his status." *Ibid.* The court explained that it "would be a step too far to hold that simply by re-entering the country, [petitioner] created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal." *Ibid.* Accordingly, the court held that application of Section 1231(a)(5) to petitioner had no retroactive effect, and that petitioner thus was ineligible to seek discretionary relief from removal.[3]

SUMMARY OF ARGUMENT

The central object of Section 1231(a)(5) is not to regulate the act of illegally reentering the country, but instead is to facilitate the *removal* of an alien who is unlawfully present as the result of an illegal reentry. Because the provision is addressed to the Attorney General (now the Secretary of Home-

[3] Although petitioner was removed to Mexico while the case was pending in the court of appeals (Pet. 7), his removal does not moot the proceedings. If petitioner were to prevail in this Court, he would be permitted to seek adjustment of status, and any grant of adjustment would give him lawful status in the United States.

land Security, see 6 U.S.C. 251(2) (Supp. II 2002)) and the process for removing the alien—as opposed to penalizing the alien's act of illegal reentry—its application in post-IIRIRA reinstatement proceedings is prospective in nature. *Landgraf*'s two-step inquiry confirms that Section 1231(a)(5) governs the removal of an illegal reentrant regardless of whether his unlawful reentry occurred before IIRIRA.

A. The threshold question under *Landgraf* is whether Congress has prescribed Section 1231(a)(5)'s temporal reach. Section 1231(a)(5) provides that, "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed," the "prior order of removal is reinstated" and the alien "shall be removed under the prior order." 8 U.S.C. 1231(a)(5). The statute therefore is triggered by the Secretary's "finding" that an alien is an illegal reentrant, not by the aliens's act of illegal reentry. That finding is the relevant event for judging the statute's retroactivity. And because the provision applies upon a finding that an alien "*has reentered* the United States illegally," with no qualification based on when that past reentry occurred, there is no basis for concluding that the provision's applicability turns on whether the reentry was before or after IIRIRA.

Section 1231(a)(5) contrasts with other IIRIRA provisions addressing illegal entry itself, as to which Congress made express specification that IIRIRA's amendments apply solely to post-IIRIRA entries. Congress made such a specification both with respect to IIRIRA's expansion of the criminal prohibition on illegal reentry and with respect to IIRIRA's enactment of civil monetary penalties for illegal entry. 8 U.S.C. 1325(b), 1326(a). The disparate treatment reflects that, while those provisions turn on the conduct of illegal entry, Section 1231(a)(5) governs the process of removal. Section 1231(a)(5) imposes no new consequences on the conduct of illegal reentry, but simply enforces the alien's prior order of removal.

Section 1231(a)(5) therefore applies to all aliens found after IIRIRA's effective date to be an illegal reentrant, regardless of when the illegal reentry occurred.

Congress reinforced that intention in certain post-IIRIRA enactments affording specific categories of aliens an opportunity to seek adjustment of status. The only aliens eligible to seek adjustment under those statutes were required to be present in the United States well before IIRIRA's effective date. Congress nonetheless specifically exempted those aliens from the operation of Section 1231(a)(5). That step would have had no effect if, as petitioner claims, Section 1231(a)(5) applied only to aliens who entered illegally after IIRIRA's effective date.

There is no merit to petitioner's reliance on a negative inference based on a clause in the predecessor reinstatement provision stating that it applied regardless of whether an illegal reentrant's previous *removal* had been "before or after" the INA's enactment date of June 27, 1952. 8 U.S.C. 1252(f) (1994). That "before and after" clause addressed the date of an illegal reentrant's previous removal from the country, not the date of his illegal reentry. Moreover, the "before and after" clause by its express terms related to the date of the *INA*'s enactment in 1952. Congress's failure to reenact that language in Section 1231(a)(5) thus in no way suggests that the applicability of that provision might depend on the date of an alien's illegal *reentry*, let alone the date of reentry in relation to *IIRIRA*'s effective date. Rather, Congress presumably declined to carry forward the language simply because it was no longer necessary in 1996 to address the reinstatement provision's applicability in relation to the date of the INA's original enactment in 1952.

Every indication therefore is that Congress intended Section 1231(a)(5) to govern removal of an illegal reentrant regardless of when the illegal reentry occurred. Even if Section

1231(a)(5) does not explicitly address the temporal issue with sufficient specificity to satisfy *Landgraf*'s requirement of an express command, under the approach applied in *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696-697 (2004), the terms and structure of Section 1231(a)(5) and of the related, post-IIRIRA statutes are sufficiently clear to establish that Section 1231(a)(5) applies to aliens whose illegal reentry predated IIRIRA's effective date.

B. Application of Section 1231(a)(5) to aliens who illegally reentered the country before IIRIRA is not retroactive. Petitioner's argument for a retroactive effect begins with the erroneous premise that Section 1231(a)(5) regulates the conduct of illegal reentry. Section 1231(a)(5) regulates the *removal* of an alien through reinstatement of his prior removal order, not the alien's act of illegal reentry. That understanding follows from the terms of Section 1231(a)(5), and also from the statutory context. IIRIRA enacted Section 1231(a)(5) as part of a new section of the INA that addresses the execution of orders of removal, including, for instance, the countries to which an alien may be removed, the detention of the alien pending removal, and the transportation of the alien to the removal destination. Because Section 1231(a)(5) likewise regulates the process of removal, its application in post-IIRIRA reinstatement proceedings is inherently prospective. See *Altmann*, 541 U.S. at 696-697.

In addition, application of Section 1231(a)(5) to aliens who illegally reentered the country before IIRIRA involves no interference with "settled expectations" or "reasonable reliance" interests. *Landgraf*, 511 U.S. at 270. An alien who illegally reentered the country could have no legitimate expectation of being permitted to remain. Section 1231(a)(5), by prescribing that an illegal reentrant once again be removed pursuant to his prior order of removal, merely undoes the intervening act of illegal reentry and restores the state of

affairs that prevailed beforehand, in which the alien had been removed from the country under the prior order and had no lawful basis for reentering.

There is no merit to petitioner's contention that applying Section 1231(a)(5) to an alien whose reentry predated IIRIRA would attach new legal consequences to the completed act of illegal reentry itself. An alien who committed the crime of illegal reentry could make no persuasive claim that he might have declined to do so had he been ineligible to seek discretionary relief from removal. Moreover, aliens who illegally reentered before IIRIRA could not assert that the reentry was made in reasonable reliance on the specific forms of relief invoked by petitioner. Adjustment of status, for instance, was categorically unavailable to illegal entrants at the time of petitioner's illegal reentry (and until shortly before IIRIRA's enactment). And cancellation of removal requires accruing ten years of continuous presence in the country, and therefore was unavailable at the time of an illegal reentry.

INS v. *St. Cyr*, 533 U.S. 289 (2001), does not support petitioner's retroactivity claim. *St. Cyr* held that IIRIRA's elimination of discretionary relief from removal under Section 212(c) of the INA for permanent resident aliens convicted of an aggravated felony produced a retroactive effect in the case of aliens who had pleaded guilty to an aggravated felony before IIRIRA's enactment. In this case, there is no plea of guilty or comparable transaction that independently gives rise to legitimate reliance interests in the availability of discretionary relief. Moreover, St. Cyr, unlike petitioner, was a lawful permanent resident with correspondingly enhanced expectations of remaining in the country.

Finally, there is no merit to petitioner's claim of a retroactive effect based, not on his "completed" act of illegal reentry, but instead on events that transpired *after* his illegal reentry—including, for instance, his accumulating sufficient years

of physical presence to gain eligibility for cancellation of removal, his fathering of a citizen-son, and his (post-IIRIRA) marriage to a citizen-spouse. There is no basis in this Court's decisions or in the principles of fairness underlying retroactivity law for recognizing reasonable reliance interests based on events that transpired only by virtue of petitioner's ability to avoid detection and prolong his illegal presence in the country.

ARGUMENT

SECTION 1231(a)(5) GOVERNS THE REMOVAL OF AN ILLEGAL REENTRANT UNDER HIS PRIOR ORDER OF REMOVAL REGARDLESS OF WHEN THE ILLEGAL REENTRY OCCURRED

Section 1231(a)(5) provides for removal of an illegal reentrant through reinstatement of his prior order of removal. The statute does not regulate the primary conduct of illegal reentry, but rather governs the alien's removal. Because Section 1231(a)(5) turns on an alien's having the status of an illegal reentrant, its application to aliens who had that status when IIRIRA took effect is prospective in nature.

That is particularly the case because an alien who entered the country illegally and maintained an unlawful presence could have no legitimate expectation that he could remain. Indeed, because Section 1231(a)(5) deals with illegal *re*-entrants, it only assumes significance in the case of an alien who has already been ordered removed but nonetheless has unlawfully returned. By providing for reinstatement of the prior order and removal of the alien under that order, Section 1231(a)(5) works no interference with legitimate expectations or reasonable reliance interests. Rather, it simply undoes the intervening act of illegal reentry and restores the status quo ante. Accordingly, as is confirmed by the two-step inquiry set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994),

Section 1231(a)(5) governs the removal of an illegal reentrant under his prior order of removal without regard to when his illegal reentry may have occurred.

A. The Terms Of Section 1231(a)(5) And Related Statutory Provisions Establish That Section 1231(a)(5) Applies To Aliens Whose Illegal Reentry Predated IIRIRA's Effective Date

The threshold question under *Landgraf* is whether Congress prescribed Section 1231(a)(5)'s temporal reach. See *Martin* v. *Hadix*, 527 U.S. 343, 352 (1999); *Landgraf*, 511 U.S. at 280. If Congress has done so, there is no need to reach step two of the *Landgraf* framework concerning whether application of Section 1231(a)(5) would be retroactive. *Ibid.*

Petitioner points to nothing that exempts aliens who unlawfully reentered the United States prior to IIRIRA from the categorical terms of Section 1231(a)(5). Petitioner nonetheless argues that Section 1231(a)(5) reveals a congressional intent that the provision have no application to an alien whose illegal reentry predated IIRIRA's effective date. Pet. Br. 16-28. That argument lacks merit, and it has correctly been rejected by the majority of courts of appeals to have considered it. See Pet. App. 12a-13a. Indeed, the clear import of the terms of Section 1231(a)(5) and related statutory provisions is that Section 1231(a)(5) governs the process of removing illegal reentrants regardless of when the reentry occurred.

1. Section 1231(a)(5) and related statutes reflect a congressional intent that the provision applies to aliens whose illegal reentry predated IIRIRA

a. Section 1231(a)(5) provides for reinstatement of a prior removal order if "the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal" 8 U.S.C. 1231(a)(5). Nothing in those terms suggests

an intent to preclude the provision's application in the case of an alien whose illegal reentry predated the statute's effective date. The triggering event under the statute is not an illegal reentry, but a "finding" by the Attorney General (now, the Secretary of Homeland Security, see 6 U.S.C. 251(2) (Supp. II 2002), that an alien "has reentered the United States illegally" after previously having been removed. *Ibid.* In the event of such a finding, "the prior order of removal is reinstated" and the alien "shall be removed under the prior order." *Ibid.* The finding is the relevant event for judging the statute's retroactivity, and the statute has no impermissible retroactive effect. Cf. *Landgraf*, 511 U.S. at 290-294 (Scalia, J., concurring in the judgment).

To the contrary, the language Congress used demonstrates its intention that Section 1231(a)(5) governs the procedure for the *present*, post-IIRIRA removal, through reinstatement, of an alien who reentered illegally at some point in the past and remains in the United States in unlawful status at the time of the Secretary's finding. And because the provision governs reinstatement of a removal order against an alien who "has reentered" the country illegally, without any qualification based on when the past reentry occurred, there is no basis for exempting from the statute's reach an alien who "had reentered" before IIRIRA's effective date.

That reading is reinforced by Section 1231(a)(5)'s prescription that, upon reinstatement of the prior order of removal, the "alien shall be removed under the prior order *at any time* after the reentry." 8 U.S.C. 1231(a)(5) (emphasis added). If Congress had intended to condition the removal authority on when the illegal reentry occurred, Congress would not have afforded unqualified authority to effect removal "at any time after the reentry," without specifying the timing of the reentry itself.

b. A comparison of Section 1231(a)(5)'s terms with other IIRIRA provisions addressed to the subject of illegal entry—*i.e.*, to the illegal reentry itself—reinforces the conclusion that Section 1231(a)(5) encompasses unlawful reentrants regardless of whether their illegal reentry occurred before IIRIRA. IIRIRA amended the longstanding criminal bar against illegal reentry following removal, codified at 8 U.S.C. 1326. See IIRIRA § 324, 110 Stat. 3009-629. That provision, as amended by IIRIRA, makes it a crime for any alien who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding," to "enter[], attempt[] to enter, or [be] found in, the United States" without authorization or proof that no authorization is required. 8 U.S.C. 1326(a). IIRIRA expanded the scope of the offense to encompass illegal reentry following voluntary departure, whereas it previously had been limited to illegal reentry following deportation or exclusion. See IIRIRA § 324(a), 110 Stat. 3009-629. Significantly, Congress prescribed that IIRIRA's amendments to the criminal prohibition "shall apply * * * only with respect to entries (and attempted entries) occurring on or after" IIRIRA's enactment date. IIRIRA § 324(c), 110 Stat. 3009-629. The absence of any comparable restriction on the temporal scope of Section 1231(a)(5) indicates that no such restriction was intended.[4]

This difference in temporal scope reflects the difference in what Congress has chosen to regulate in the two provisions. Section 1326 regulates the *conduct* of illegal reentry, and is triggered when the alien "enters" or "attempts to enter" the

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[4] As petitioner observes (Pet. Br. 35), the Ex Post Facto Clause would independently dictate that IIRIRA's expansion of the criminal prohibition against illegal reentry could apply only to post-enactment reentries. That Congress nonetheless specified that limitation in IIRIRA only underscores the significance of the lack of a parallel specification for Section 1231(a)(5).

country illegally. Section 1231(a)(5), by contrast, governs the Secretary's process of removing aliens who have the *status* of illegal reentrants, and is triggered when the Secretary "finds" that an alien present in the United States is one who "has reentered" illegally after having been removed. Cf. *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). Furthermore, Section 1326 imposes punishment on the alien for engaging in the conduct of unlawful entry, while Section 1231(a)(5) terminates the alien's unlawful status by removing him immediately from the United States.

Because Section 1326, unlike Section 1231(a)(5), punishes the primary conduct of illegal reentry, Congress prescribed that IIRIRA's changes to Section 1326 would apply only to acts of illegal reentry that occur after IIRIRA's enactment. But because Section 1231(a)(5) governs the Secretary's process of removing aliens he finds to have reentered illegally and simply provides for the Secretary to undo the illegal reentry and restore the status quo ante by sending the alien outside the United States, Congress had no occasion to limit its application to aliens whose illegal reentry occurred after IIRIRA was enacted. While an alien whose prior order of removal is reinstated under Section 1231(a)(5) is not eligible for any discretionary relief, that simply reflects the fact that Section 1231(a)(5) operates to enforce the prior order of removal, that the prior order is already final and thus precludes such relief, and that if the alien had remained outside the United States, where he previously had been sent, there would be no basis for him to request immigration benefits (*e.g.*, adjustment of status, cancellation of removal, or voluntary departure) that are available to certain aliens in the United States.

IIRIRA's new provisions imposing civil monetary penalties on the act of illegal entry, which parallel the amendments

to the criminal prohibition against illegal reentry, also stand in marked contrast to Section 1231(a)(5). IIRIRA amended the INA by providing for the imposition of a civil monetary penalty on "[a]ny alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers." IIRIRA § 105(a)(2), 110 Stat. 3009-556 (codified at 8 U.S.C. 1325(b)). That provision, like the criminal prohibition on illegal reentry—but unlike Section 1231(a)(5)—imposes sanctions for engaging in the conduct of illegal entry. Accordingly, as with IIRIRA's amendments to the criminal prohibition, but in significant contrast to Section 1231(a)(5), Congress specified that the imposition of civil penalties on illegal entry "shall apply only to illegal entries or attempts to enter occurring on or after" IIRIRA's effective date. IIRIRA § 105(b), 110 Stat. 3009-556. The civil penalty provision thus reinforces the conclusion that Section 1231(a)(5), which has the distinct purpose of terminating the alien's continuing unlawful presence, does not have the temporal restriction that petitioner urges.[5]

c. Congress's express treatment of Section 1231(a)(5) in statutes enacted since IIRIRA confirms that the provision encompasses illegal reentrants who made their unlawful reentry before IIRIRA. In 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Tit. II, § 202, 111 Stat. 2193 (8 U.S.C. 1255 note), and in 1998, Congress enacted the Hai-

[5] Because it imposes sanctions for past conduct, that provision, like the criminal prohibition in Section 1326, presumably would apply only to future entries even in the absence of an express specification to that effect. Congress's express specification reinforces the general notion that, when Congress addresses primary conduct as such, it generally does not impose new consequences on past acts, but when it addresses procedures for removing aliens, it intends to alter those proceedings prospectively in the sense of modifying all future proceedings without regard to when the underlying primary conduct occurred.

tian Refugee Immigration Fairness Act (HRIFA), Pub. L. No. 105-277, Div. A, § 101(h) [Tit. IX, § 902], 112 Stat. 2681-538 (8 U.S.C. 1255 note). Those enactments afforded certain aliens from Nicaragua, Cuba, and Haiti a limited window of opportunity to seek adjustment of status. Critically for present purposes, to be eligible to seek adjustment under those statutes, the aliens must have maintained continuous presence in the United States beginning not later than December 1, 1995, in the case of NACARA, and December 31, 1995, in the case of HRIFA. See NACARA § 202(b)(1), 111 Stat. 2194; HRIFA § 902(b)(1), 112 Stat. 2681-538.

NACARA and HRIFA alleviated various restrictions on seeking relief that otherwise would have applied. Of particular relevance to this case, Congress specifically provided that aliens covered by NACARA and HRIFA who had illegally reentered the United States following deportation would be exempt from the operation of Section 1231(a)(5). Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1505(a)(1) and (b)(1)], 114 Stat. 2763A-326 (amending NACARA and HRIFA); see 8 C.F.R. 241.8(d); H.R. Rep. No. 1048, 106th Cong., 2d Sess. 231 (2001) ("Nicaraguan[s], Cubans, and Haitians eligible for adjustment of status * * * under NACARA and HRIFA may receive this relief despite having been previously removed under an order of removal"). Because relief under NACARA and HRIFA is restricted to aliens who were present in the country as of December 1, 1995, and December 31, 1995, respectively—well before IIRIRA's effective date of April 1, 1997—there would have been no need for Congress to exempt aliens covered by those statutes from Section 1231(a)(5) under petitioner's reading of the provision as applying solely to illegal reentries after April 1, 1997.

The same conclusion follows from Congress's treatment of Section 1231(a)(5) in connection with the Legal Immigration Family Equity Act, Pub. L. No. 106-553, § 1(a)(2) [Tit. XI],

114 Stat. 2762A-142. That Act permits certain aliens covered by the litigation addressed in *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993), to seek adjustment of status. To be eligible for adjustment, an alien must have entered the United States before January 1, 1982. § 1104(c)(2)(B)(i), 114 Stat. 2762A-146. Although all eligible aliens therefore had entered the United States more than 14 years before IIRIRA's effective date, Congress specifically provided that any covered alien whose presence was the result of an illegal reentry was exempt from the operation of Section 1231(a)(5). See LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1503(c)], 114 Stat. 2763A-325. That action again can be explained only if Section 1231(a)(5) applies to aliens who had illegally reentered the country before the enactment of IIRIRA.

2. Petitioner errs in relying on an asserted negative inference gleaned from the absence in Section 1231(a)(5) of "before or after" language contained in the predecessor reinstatement provision

In the face of the many affirmative indications of Congress's intent that Section 1231(a)(5) apply to aliens whose illegal reentry predated IIRIRA, petitioner chiefly relies (Pet. Br. 16-24) on a negative inference he draws from a comparison of Section 1231(a)(5) with the predecessor provision, 8 U.S.C. 1252(f) (1994). Petitioner emphasizes that the former provision allowed for reinstatement of a previous deportation order upon a finding that an alien "has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after June 27, 1952* [the date of the INA's enactment], on any ground described in any of the paragraphs enumerated in subsection (e)." 8 U.S.C. 1252(f) (1994) (emphasis added). According to petitioner, Congress, by failing to reen-

act the "before or after" clause in Section 1231(a)(5), signaled by negative implication that the provision does not reach aliens who had illegally reentered "before" IIRIRA's effective date. That argument is fundamentally flawed.

a. Petitioner's argument for a negative inference rests on the premise that the phrase, "before or after June 27, 1952," in the former reinstatement provision concerned the date of an alien's illegal *reentry*. See Pet. Br. 17. That premise is incorrect. The "before or after" clause pertained to the date of the alien's previous *deportation* or *departure* from the country, not the date of the alien's illegal reentry.

That understanding is compelled by the surrounding statutory text. The "before or after" clause immediately followed a reference to the alien's "having previously departed or been deported pursuant to an order of deportation," and the clause immediately preceded a description of the ground for the alien's previous deportation or departure, *i.e.*, "on any ground described in any of the paragraphs enumerated in subsection (e) of this section." 8 U.S.C. 1252(f) (1994). Because the "before or after" clause was adjoined on both sides by language addressing the alien's previous deportation or departure, the clause plainly was addressed to the date of that deportation or departure. If Congress instead had intended for the clause to address the date of the alien's illegal reentry, it would have inserted the clause after the phrase, "has unlawfully reentered the United States," 8 U.S.C. 1252(f) (1994), rather than in the midst of language discussing the previous deportation or departure.

The origins of the "before or after" clause erase any doubt concerning its proper interpretation. The original reinstatement provision enacted in 1950 contained no "before or after" language. See Internal Security Act of 1950, § 23, 64 Stat. 1012 (8 U.S.C. 156(d) (1946 & Supp. V 1952) (quoted at p. 2, *supra*). In regulations implementing that provision, the Im-

migration and Naturalization Service (INS) confined the reinstatement authority to illegal reentrants whose previous deportation or departure postdated the statute's effective date. The regulations thus provided for reinstatement when an alien "unlawfully returns to the United States after having been released for departure under an order of deportation *on or after September 23, 1950*, or after having been deported * * * *on or after that date*." 8 C.F.R. 152.5 (1949 & Supp. I 1951) (emphasis added). When Congress enacted the INA soon thereafter in 1952, the addition of the "before or after" clause directly responded to the INS's interpretation, and clarified that the reinstatement authority did not vary based on whether the alien's previous deportation or departure came before or after the INA's enactment.

Because the "before or after" clause pertained to the date of the alien's previous deportation or departure—rather than to the date of the alien's illegal reentry—the absence of such language in Section 1231(a)(5) in no way suggests that Congress sought to draw a distinction based on the timing of illegal reentry. Indeed, that language suggests that neither the 1996 Congress nor the 1952 Congress viewed the date of illegal reentry as critical to the provision's operation. Rather, the provision directly regulates the Secretary's determination of the prospective consequences of the prior order of removal.

Petitioner's negative-inference argument also rests on an additional misconception: that the "before or after" clause, had it been carried forward in Section 1231(a)(5), would have been tied to *IIRIRA*'s effective date. Instead, the "before or after" clause by its terms was pinned to the date of the *INA*'s enactment. See INA § 242(f), 66 Stat. 212 (1952) ("whether before or after the date of enactment *of this Act*," *i.e.*, the INA) (emphasis added); 8 U.S.C. 1252(f) (1994) (substituting actual date of INA's enactment—"whether before or after June 27, 1952"—in codified version); Pet. Br. 17-18 n.9.

As a result, if Congress had carried forward the "before or after" clause as it read in the INA, that would have said nothing about the applicability of Section 1231(a)(5) vis-a-vis the enactment of *IIRIRA*. Instead, the clause would have continued to specify that the reinstatement provision applies regardless of whether the date of the alien's previous deportation or departure was before or after the *INA*'s enactment. Congress thus may have elected not to reenact the "before or after" clause for the simple reason that, by 1996, when IIRIRA was enacted, there was no enduring need to maintain the specification that the reinstatement authority encompasses aliens whose previous deportation or departure was "before * * * June 27, 1952." 8 U.S.C. 1252(f) (1994). Settled practice by then had long made the date of the prior deportation irrelevant, and aliens who had been deported at least 44 years earlier would not in any event have been a central concern of Congress.[6]

b. Petitioner also raises essentially the same negative-inference argument in connection with the legislative history of IIRIRA. Pet. Br. 21-24. The House bill that led to IIRIRA called for repeal of the former reinstatement provision and enactment of a new one. The proposed new provision, which

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[6] Petitioner does not suggest that his negative-inference argument could have merit even if, as we demonstrate in the text, the "before or after" clause referred to the date of the previous deportation or departure rather than the date of illegal reentry. Any such contention would require accepting three layers of negative inference, each of which is dubious in its own right: (i) by failing to reenact a "before or after" clause, Congress manifested an intent concerning the temporal reach of Section 1231(a)(5); (ii) by failing to reenact language that concerned the date of an alien's previous deportation or departure, Congress manifested an intent about the distinct question of the date of an alien's illegal reentry; and (iii) by failing to reenact a clause that referred in terms to the date of the INA's enactment, Congress manifested an intent tied to the effective date of IIRIRA. There is no basis for accepting any of those contentions, let alone all three.

became Section 1231(a)(5), *inter alia*, expanded the reinstatement authority to encompass all illegal reentrants and also shed the "before or after" clause. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 26 (1996). The Senate bill, while generally proposing wholesale changes to the immigration laws, would have made no change in the reinstatement provision in former Section 242(f) of the INA (8 U.S.C. 242(f) (1994)), including its "before or after" reference to the date of the *INA*'s enactment. See S. Rep. No. 249, 104th Cong., 2d Sess. 118 (1996). Petitioner infers from Congress's enactment of the House version that Congress reached a compromise under which it accepted the House's expansion of the reinstatement provision to encompass all illegal reentrants, but rejected the proposition that the provision should apply to aliens who illegally reentered prior to IIRIRA.

Petitioner's argument rests on a clear misunderstanding of the legislative history. Contrary to petitioner's suggestion, the Senate bill did not contain a new reinstatement provision at all, much less one that would have expressly applied to aliens whose prior deportation (or subsequent reentry) occurred "before or after" the new bill's effective date. As explained above, the Senate bill would have left former Section 242(f) unamended. See S. Rep. No. 249, *supra*, at 118.[7] Congress's enactment of the reinstatement provision in the House bill therefore does not reflect either a compromise with some different Senate version of a new reinstatement provision, or a rejection of a Senate proposal to enact a new reinstatement

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[7] Page 118 of the Senate Report, which petitioner cites (Pet. Br. 21), is in a portion of the Report that shows how the INA would have been affected by the Senate bill. Section 242(f) of the INA appears in Roman type, indicating it was to be unaffected (see S. Rep. No. 249, *supra*, at 70), except for the insertion (in italics) of a subsection "(1)" preceding it. The Sixth Circuit, in *Bejjani* v. *INS*, 271 F.3d 670, 685 (2001), misread the Senate Report in a manner similar to petitioner.

provision that would have expressly applied to aliens whose prior deportations (or subsequent reentries) occurred "before" as well as "after" the effective date of IIRIRA. The legislative history reveals nothing except what is evident from the enactment of IIRIRA itself: Congress chose to enact the new Section 241(a)(5) of the INA—codified at 8 U.S.C. 1231(a)(5)—rather than to leave former Section 242(f) of the INA unamended. For the reasons explained, Congress's failure to reenact the "before or after" clause says nothing about whether Section 1231(a)(5)'s applicability turns on the timing of an illegal reentry, especially the timing of reentry in relation to IIRIRA's effective date.

This Court, moreover, rejected a similar argument in *Martin* v. *Hadix*, 527 U.S. 343 (1999), that had far more force than petitioner's in this case. *Martin* concerned Congress's enactment of limitations on the hourly rate for attorney's fee awards in the Prison Litigation Reform Act of 1996 (PLRA), 42 U.S.C. 1997e(d)(3). The Court rejected an argument that, as long as a particular suit had been filed before the PLRA, the fee limitation would have no effect on fee recoveries in the case even for post-PLRA work. That argument was based on the fact that, during consideration of the bill in Congress, the provisions imposing the fee limitation were moved from one section of the PLRA to another, where the former section contained language applying its provisions to pending cases but the latter section did not. See 527 U.S. at 355-356. The Court considered that argument to "overstate[] the inferences that can be drawn from an ambiguous act of legislative drafting," explaining that the fee provisions may have been moved "for a variety of other reasons." *Id.* at 357. That conclusion is even more warranted in this case, because, whatever may have been Congress's reasons for failing to reenact the "before or after" clause in former Section 242(f) of the INA, a correct understanding of the clause makes clear that Con-

gress's failure to reenact it bears no relation to concerns about the timing of an alien's illegal reentry—and especially no such relation vis-a-vis the effective date of *IIRIRA*.

c. In light of the fatal shortcomings of petitioner's negative-inference argument, his heavy reliance (Br. 19-20, 32-33) on *Lindh* v. *Murphy*, 521 U.S. 320 (1997), is misplaced. *Lindh* addressed whether certain amendments governing habeas corpus review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, were applicable to cases pending when the amendments were enacted. The Court drew a negative inference from an AEDPA provision that addressed precisely that subject and that specified that a separate group of AEDPA amendments would apply to pending cases. *Lindh*, 521 U.S. at 326-328; *Martin*, 527 U.S. at 356. The Court concluded that "[n]othing * * * but a different intent" could "explain[] the different treatment." *Lindh*, 521 U.S. at 329.

Here, unlike in *Lindh*, the "before or after" clause on which petitioner rests his negative-inference argument pertained to a subject that was entirely distinct from the date of an alien's illegal reentry, and also referred to a specific date (the date of the INA's enactment) that was entirely distinct from the date that IIRIRA became effective. See *Martin*, 527 U.S. at 356 ("Because [the provisions] address wholly distinct subject matters, the same negative inference" as in *Lindh* "does not arise."). The reasoning in *Lindh*, in fact, weighs *against* petitioner here in light of IIRIRA's specification that its amendments to the criminal prohibition against illegal reentry and its new civil penalties for illegal entry apply only to post-IIRIRA entries, and the absence of any comparable specification with respect to Section 1231(a)(5). See pp. 14-16, *supra*.

3. *Petitioner's remaining arguments under step one of the* Landgraf *inquiry are without merit*

a. Petitioner contends (Br. 24-26) that any doubt about Congress's intent concerning Section 1231(a)(5)'s temporal reach should be resolved in his favor in light of the presumption against retroactivity. That reasoning fundamentally misconceives the nature of the presumption.

It is axiomatic that *Landgraf*'s presumption against retroactivity could be triggered only if the statute's application would be retroactive within the meaning of *Landgraf*, *i.e.*, would produce a retroactive effect. See, *e.g.*, *Martin*, 527 U.S. at 352.[8] A determination as to retroactive effect is the office of step two of the *Landgraf* test, and "comes *at the end* of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270 (emphasis added). Petitioner, however, would invoke the presumption against retroactivity at step one of the *Landgraf* analysis as a reason to conclude that Congress meant for Section 1231(a)(5) to be inapplicable to pre-IIRIRA reentrants, without any assessment of whether the provision's application actually would be retroactive.

Petitioner effectively seeks to transform the presumption against retroactivity into a presumption against *alleged* retroactivity. That approach is incompatible with this Court's decisions. As the Court has explained, "*if* the [statute] has a ret-

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[8] Alternatively, as we explain in Part B.1, *infra*, the inquiry into retroactivity can be limited solely to temporal considerations, such that, absent a contrary intent, the statute has only prospective application based on the relevant event for retroactivity purposes—here, the Secretary's finding that the alien satisfies the statutory prerequisites for reinstatement of his prior removal order. See generally *Landgraf*, 511 U.S. at 290-294 (Scalia, J., concurring in the judgment).

roactive effect, *then* we presume it will not apply to the conduct * * * which occurred prior to its effective date." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (emphasis added); accord *Martin*, 527 U.S. at 352; *Landgraf*, 511 U.S. at 280. Consequently, there is no basis for petitioner to benefit from the presumption without a predicate finding of retroactive effect.

b. Petitioner contends (Br. 27-28) that ambiguity concerning Section 1231(a)(5)'s temporal reach should be construed in favor of the alien, and (Br. 28-33) that the Court should adopt his interpretation of Section 1231(a)(5) even absent any unambiguous indication that Congress desired that result. Those arguments are unavailing. Petitioner's arguments do not approach demonstrating that Congress intended to exempt aliens whose illegal reentry predated IIRIRA from the application of Section 1231(a)(5). All relevant statutory provisions, in fact, point to the contrary conclusion.

Moreover, the practical implications of petitioner's interpretation of Section 1231(a)(5) weigh strongly against its adoption. Section 1231(a)(5) not only prescribes that an illegal reentrant is ineligible for discretionary relief, but it also expands the reinstatement authority to encompass all illegal reentrants regardless of the basis of their prior removal orders, and specifies that an illegal reentrant's prior removal order is not subject to challenge. See pp. 3-4, *supra*. According to petitioner's argument (see Pet. 19 n.15), *none* of those features could be applied to an illegal reentrant who was in the United States as of IIRIRA's effective date.

Petitioner's position thus would attribute to Congress the intention to insulate from those provisions any illegal reentrant who happened to have reentered the United States illegally before IIRIRA's effective date and managed to evade detection until after that date. The result under petitioner's view is that, when Section 1231(a)(5) took effect, the bar to

challenging the prior removal order, the expanded coverage to encompass all illegal reentrants, and the ineligibility for relief from removal, had *no* application to *any* existing illegal reentrant. Indeed, as long as an illegal reentrant had managed to reenter illegally and evade detection until IIRIRA took effect, petitioner's reading would grant the alien a permanent immunity from the operation of Section 1231(a)(5) and a permanent entitlement to treatment under the displaced predecessor provision, even if the alien's unlawful presence were first discovered years or even decades after IIRIRA's effective date. There is no basis for supposing that the Congress that enacted IIRIRA—which was intent on expediting the removal of aliens who were illegally present in the United States, see H.R. Rep. No. 469, *supra*, at 107-108—could have intended that anomalous result.

4. The Court can decide that Section 1231(a)(5) applies to petitioner based on the terms of that section and related statutory provisions

As explained above, the terms of Section 1231(a)(5), the contrasting language of other IIRIRA provisions addressing illegal entry, and Congress's express treatment of Section 1231(a)(5) in post-IIRIRA statutes, all demonstrate Congress's intent that Section 1231(a)(5) governs reinstatement of an illegal reentrant's prior removal order regardless of when the u.. awful reentry occurred. As this Court recently concluded, even if Congress does not expressly address the temporal question with "sufficient [specificity] to satisfy *Landgraf*'s 'express command' requirement," the statute's import and context nonetheless might be sufficiently clear in certain circumstances to resolve the temporal issue. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 697 (2004) (quoting *Landgraf*, 511 U.S. at 280). That is the case here.

As explained in Point B.1, *infra*, this Court held in *Altmann* that the *Landgraf* framework, including its requirement of an express statement of a statute's applicability to pre-enactment conduct, was not fully applicable to the Foreign Sovereign Immunities Act of 1976 (FSIA) because the FSIA was intended to regulate, not past primary conduct, but rather the present immunity of a foreign sovereign in United States courts. Here, too, Section 1231(a)(5) does not regulate past primary conduct such as illegal reentry, but rather regulates the Secretary's *present* removal process and denies the alien a *present* immunity for his illegal reentry in disregard of the prior removal order by specifying that removal will occur through reinstatement of that order. That statutory focus on prospectively regulating the removal of aliens who have violated a prior order of removal, regardless of the date of illegal reentry, is reinforced by subsequent enactments premised on Section 1231(a)(5)'s applicability regardless of the date of illegal reentry. Under *Altmann*, the text and structure of Section 1231(a)(5) and related statutory provisions are sufficiently clear to establish that Section 1231(a)(5) applies to aliens whose illegal reentry occurred before as well as after IIRIRA's effective date.[9]

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[9] The government has not previously argued in this case that the text and context of Section 1231(a)(5), coupled with the text of other statutes, settles the temporal application of that section under the analysis applied in *Altmann*. That conclusion, however, logically follows from the government's arguments in rebuttal to petitioner's contention that he should prevail under *Landgraf*'s first step, and the issue is anterior to the second step of the *Landgraf* analysis. In addition, petitioner himself argues that the "critical issue" in resolving the retroactivity question is "identifying 'the relevant activity that the statute in question regulates,'" Pet. Br. 34 (quoting *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment)) (brackets omitted), which is precisely the approach adopted by this Court in *Altmann*, 541 U.S. at 696-697 & n.17.

B. Application Of Section 1231(a)(5) To Aliens Whose Illegal Reentry Predated IIRIRA Is Not Retroactive

Every indication is that Congress intended Section 1231(a)(5) to govern post-IIRIRA reinstatement proceedings regardless of the date of the alien's illegal reentry. But even if the Court concludes that the government cannot prevail on the basis of statutory text and structure alone, it is clear that *petitioner* cannot prevail at step one of the *Landgraf* inquiry. In that event, petitioner must show that application of Section 1231(a)(5) in the circumstances of this case would be retroactive. Petitioner cannot make that showing.

1. Because Section 1231(a)(5) regulates the manner of removal rather than the act of illegal reentry, the provision's application in post-IIRIRA proceedings is inherently prospective

a. In arguing that Section 1231(a)(5)'s application to pre-IIRIRA illegal reentrants is retroactive, petitioner begins with the premise that Section 1231(a)(5) regulates the act of illegal reentry. Pet. Br. 12-13, 34-36. That is incorrect. The terms of Section 1231(a)(5) and the statutory context make clear that the provision regulates the Secretary's removal of an illegal reentrant through reinstatement and enforcement of the prior removal order, not the alien's primary conduct of illegal reentry. Because the prior removal order is already final and "not subject to being reopened or reviewed," 8 U.S.C. 1231(a)(5), Congress provided as a logical corollary that the alien is ineligible for discretionary immigration benefits such as adjustment of status. Congress reasonably determined that, not only would the availability of such benefits allowing the alien to remain in the United States be inconsistent with the alien's status of having already been ordered removed—and indeed, having actually been removed or departed under that prior order at least once—but also that

creating a process for the alien to apply for such relief would delay the removal of such aliens and thereby frustrate the purpose of Section 1231(a)(5) of providing for the immediate execution of the prior order of removal.

Enforcement of prior removal orders in that manner presents no substantial retroactivity concerns for aliens who were removed but then illegally reentered the United States before IIRIRA and remained here unlawfully after IIRIRA's enactment. Indeed, the prior order of removal includes, at least implicitly, an ongoing obligation to stay out of the country unless the subsequent entry is lawful. Accordingly, Section 1231(a)(5)'s modification of the process of removal pursuant to a prior order of removal can be analogized to a statute modifying the process for enforcing an ongoing injunction, which would not be retroactive in any relevant sense as applied to events occurring after the statute was enacted. See *Landgraf*, 511 U.S. at 273-274; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-436 (1856).

To be sure, the fact that an alien "has reentered the United States illegally" gives rise to the authority to reinstate his prior removal order and to remove him again under that order. 8 U.S.C. 1231(a)(5). But that precondition simply reflects the obvious fact that the need to remove the alien would never arise if the alien had remained outside of the United States after his prior removal instead of reentering illegally and remaining in the United States unlawfully. Likewise, there would be no prior order to reinstate if the alien had not previously been removed (or departed voluntarily) under such an order. But although both a prior order of removal and a subsequent illegal reentry are necessary preconditions for the removal authority addressed in Section 1231(a)(5), those preconditions are not the relevant conduct that the statute seeks to regulate. Rather, the central aim of the reinstatement pro-

vision is to govern the process for removing the alien, not to punish or otherwise regulate the illegal reentry itself.

That focus is made apparent by comparing the terms of Section 1231(a)(5) with the language of other provisions that directly address illegal reentry. As explained above, when Congress has sought to regulate the act of illegal reentry itself, the triggering event under the statute is the act of illegal reentry. See 8 U.S.C. 1326(a) (making it a crime when an alien "enters, attempts to enter, or is at any time found in, the United States" after having been removed); see also 8 U.S.C. 1325(a) (making it a crime when an alien "enters or attempts to enter the United States" except as authorized by immigration officers).

The focus on the removal process is further reinforced by Section 1231(a)(5)'s companion provisions. IIRIRA enacted the reinstatement provision as part of a new section of the INA entitled "Detention and Removal of Aliens Ordered Removed." IIRIRA § 305(a)(3), 110 Stat. 3009-598 (enacting INA § 241, codified at 8 U.S.C. 1231). In addition to the reinstatement provision, Section 1231 contains provisions that concern: the period of time after entry of the removal order within which an alien is to be removed, 8 U.S.C. 1231(a)(1); the detention and supervision of the alien pending his removal, 8 U.S.C. 1231(a)(2) and (3); the countries to which the alien may be removed, 8 U.S.C. 1231(b); the transportation of the alien to the removal destination, 8 U.S.C. 1231(d); and the payment of expenses of removal, 8 U.S.C. 1231(e). The association of the reinstatement provision with those provisions demonstrates that Section 1231(a)(5) is focused, not on regulating the act of illegal reentry, but on regulating the process of removal. That has been the object of the reinstatement provision since its original enactment in 1950. See H.R. Conf. Rep. No. 3112, *supra*, at 59 (explaining the purpose of the reinstatement authority as to "to provide more effective con-

trol over, and to facilitate the deportation of, deportable aliens").[10]

b. Under the approach recently applied by the Court in *Republic of Austria* v. *Altmann*, *supra*, and advocated by concurring Justices in previous cases, see *Landgraf*, 511 U.S. at 290-294 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment); *Martin*, 527 U.S. at 362-364 (Scalia, J., concurring in part and concurring in the judgment), applying Section 1231(a)(5) in post-IIRIRA reinstatement proceedings is inherently prospective. Under that approach, because "the relevant conduct regulated by" Section 1231(a)(5) is removal of an alien found to be an illegal reentrant through reinstatement of his previous removal order, *Altmann*, 541 U.S. at 697, any reinstatement and removal that "occurs *after* the effective date of the statute is covered" by the provision and is prospective, *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment).

In *Altmann*, the Court considered whether a provision of the Foreign Sovereign Immunities Act of 1976 (FSIA) that exempts cases involving an expropriation of private property from the general grant of immunity accorded to foreign sovereigns in United States courts, 28 U.S.C. 1605(a)(3), is applicable in a case in which the alleged expropriation occurred be-

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[10] Petitioner relies (Br. 34) on a statement in a House committee report that IIRIRA was intended to prevent aliens from repeatedly entering the country unlawfully without consequence. See H.R. Rep. No. 469, *supra*, at 155. Certain of IIRIRA's provisions undoubtedly were intended to address that concern, and the particular statement cited by petitioner pertained to Title I of IIRIRA, which contained measures aimed to improve border control. See *id.* at 153-157. But while Congress desired to enhance border control in an effort to deter illegal entry, Congress also, in Title III of IIRIRA, separately enacted provisions intended to "streamline[] rules and procedures for removing illegal aliens," and in particular, "illegal aliens already present in the U.S." *Id.* at 107-108; see *id.* at 157-161. The reinstatement provision directly serves *those* objectives and thus was enacted as part of Title III.

fore the FSIA's enactment. The Court held that the FSIA—including the expropriation exemption—governs suits filed after the FSIA's enactment, regardless of whether the conduct at issue in the case occurred before the FSIA's enactment. The central basis for that holding was that the "relevant conduct" regulated by the FSIA is the assertion of immunity by a foreign sovereign rather than the underlying conduct giving rise to the suit. 541 U.S. at 697.[11]

The Court indicated in *Altmann* that it applied the approach of focusing on the "relevant conduct" regulated by the statute, because, in the context of foreign sovereign immunity, the aim is to determine a foreign sovereign's "*present*" immunity from suit rather than to enable a foreign sovereign to shape its primary conduct in reliance on the promise of "future" immunity from suit in the United States. 541 U.S. at 696-697.[12] While the Court thus suggested that its approach would not necessarily apply in other contexts, the basic rationale for the approach in *Altmann* has salience here inasmuch as Section 1231(a)(5) is focused on the *present* process for removing an illegal reentrant and the question of his *present* immunity for illegal reentry. Applying the provision to aliens who had illegally reentered the United States by the time of IIRIRA's effective date therefore is "most consistent with the * * * [statute's] principal purposes." *Altmann*, 541 U.S. at 699; see H.R. Rep. No. 469, *supra*, at 107-108 (explaining that IIRIRA's new provisions concerning removal aim to "streamline[] rules and procedures for removing illegal aliens," including those "already present in the U.S.").

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[11] The Court explained that its focus on the "relevant conduct" for retroactivity purposes adhered to the approach advocated in concurring opinions in previous cases, including, in particular, Justice Scalia's concurring opinion in *Landgraf*. See *Altmann*, 541 U.S. at 697 n.17.

[12] The Court also noted that the case did not involve "private rights." 541 U.S. at 696.

2. *Applying Section 1231(a)(5) to pre-IIRIRA illegal reentrants does not impair reasonable reliance interests or interfere with legitimate expectations*

Even putting to one side the focus of Section 1231(a)(5) on the present process for removing an illegal reentrant, petitioner cannot prevail at step two of the *Landgraf* analysis. Under *Landgraf*, the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270). The analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 358 (quoting *Landgraf*, 511 U.S. at 270).

Petitioner's arguments that Section 1231(a)(5) produces a retroactive effect fall into two distinct categories. First, petitioner contends that Section 1231(a)(5) attaches new legal consequences to his "completed," pre-IIRIRA act of illegal reentry. See *Landgraf*, 511 U.S. at 269-270. Second, petitioner argues that Section 1231(a)(5) produces a retroactive effect based on events that transpired *after* his illegal reentry but before IIRIRA's enactment. Neither claim has merit.

a. *Section 1231(a)(5)'s denial of discretionary relief does not impose new legal consequences on the completed act of illegal reentry*

Petitioner's principal argument is that application of Section 1231(a)(5) to an alien whose illegal reentry predated IIRIRA attaches new legal consequences to the alien's "completed" act of unlawful reentry. See Pet. Br. 33, 37-38, 42. For purposes of that claim, any events that transpired after the "completed" act of reentry are irrelevant, and petitioner thus should be situated no differently than an alien whose unlawful reentry was one day before IIRIRA's enactment.

Petitioner does not suggest otherwise, as he seeks a categorical ruling that Section 1231(a)(5) is retroactive with respect to all aliens whose illegal reentry predated IIRIRA, regardless of the circumstances. See Pet. Br. 36-38.

Contrary to petitioner's argument, Section 1231(a)(5) does not attach new legal consequences to the allegedly "completed" act of illegal reentry. As the Court explained in *Landgraf*, "a statute is not made retroactive merely because it draws upon antecedent facts for its operation," and "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." 511 U.S. at 269-270 n.24 (internal quotation marks omitted). Although Section 1231(a)(5) "draws upon [the] antecedent fact[]" of an alien's illegal reentry, the provision's application to aliens who made their illegal reentry and thus resumed their unlawful presence pre-IIRIRA is prospective. *Ibid.* Section 1231(a)(5) operates prospectively by terminating that unlawful status and providing for immediate removal from the United States.

i. The Court has explained that the "aim of the [*Landgraf*] presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Altmann*, 541 U.S. at 696. There is no basis for concluding that an alien who surreptitiously enters the country with no lawful status could have any legitimate, reliance-based or settled expectation that he would be permitted to remain. Section 1231(a)(5), by denying eligibility for discretionary relief and mandating removal of an illegal reentrant, does not undermine legitimate expectations or otherwise "penalize" the act of illegal reentry. Pet. Br. 11. Section 1231(a)(5) instead has the effect of *undoing* the act of illegal reentry, not penalizing it: petitioner illegally reentered the country, and Section 1231(a)(5) requires that he leave the country forthwith. Indeed, because Section 1231(a)(5) operates by reinstating a prior removal order, the ultimate effect

is to enforce that preexisting order once again rather than to impose any added consequence for the alien's act of illegal reentry after the order was enforced the first time. There is no attachment of "new" legal consequences, *Landgraf*, 511 U.S. at 270, and no retroactive unfairness, when the effect of a statute is to restore the status quo ante in that manner.

That conclusion is reinforced by the fact that petitioner's act of illegal reentry was not itself a "completed" act within the meaning of *Landgraf*, 511 U.S. at 270. That is so both because petitioner's continued presence in the United States following his illegal entry (and following the enactment of IIRIRA) was unlawful, and because petitioner could have terminated that unlawful status at any time. Petitioner and other pre-IIRIRA illegal reentrants thus could have left the country on their own at any time and avoided the operation of Section 1231(a)(5). Indeed, because IIRIRA's relevant provisions, including Section 1231(a)(5), did not go into effect until six months after the statute's enactment, see IIRIRA § 309(a), 110 Stat. 3009-625, an alien who had illegally reentered the country before IIRIRA's enactment had a six-month window within which to depart and thereby avoid the relevant provisions of IIRIRA altogether. By leaving the country, petitioner, no less than an alien who illegally reentered one day before IIRIRA became effective, would have put himself in the same position—at least from the perspective of Section 1231(a)(5)—as if he had never reentered unlawfully in the first place.[13] Because petitioner's act of illegal reentry was not irrevocable with respect to the operation of Section 1231(a)(5), that provision cannot be seen to attach new legal

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[13] Petitioner also argues that Section 1231(a)(5) operates retroactively based on events that transpired *after* his illegal reentry. That claim lacks merit, see Point B.2.c, *infra*, but in any event is distinct from his contention that Section 1231(a)(5) altered the consequences of his assertedly "completed" act of reentry.

consequences to his allegedly "completed" act of illegal reentry. Cf. *Martin*, 527 U.S. at 361 (because attorney could withdraw from case and avoid PLRA's limitation on attorney's fee recovery for post-PLRA work on the case, it cannot "be said that the PLRA change[d] the legal consequences of the attorneys' pre-PLRA decision to file the case").

ii. Petitioner's claim of reasonable reliance and settled expectations also fails as a practical matter because he cannot show that Section 1231(a)(5), by eliminating eligibility for discretionary relief from removal, changed "legal rules on which parties relied in shaping their primary conduct" of illegal reentry. *Altmann*, 541 U.S. at 696. Indeed, illegal reentry has long been considered a felony offense. 8 U.S.C. 1326; see also 8 U.S.C. 1325(a) (rendering first-time illegal entry a crime). An alien who illegally reenters the country notwithstanding the prospect of criminal prosecution and punishment could make no persuasive claim that he nonetheless might have elected to forgo an illegal reentry had he known that he would be ineligible to seek discretionary relief from removal.[14]

The absence of any cognizable claim of reasonable reliance or settled expectations becomes especially apparent upon consideration of the particular forms of discretionary relief emphasized by petitioner. Petitioner argues that, if not for Section 1231(a)(5)'s elimination of his eligibility for discretionary relief, he would have been entitled under the previous reinstatement provision to seek adjustment of status, cancellation of removal, or voluntary departure in lieu of removal. See Pet. Br. 38-41. But for purposes of petitioner's claim that

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[14] Aside from considerations of legitimate reliance and settled expectations, concerns about fair notice are substantially diminished when, as here, the conduct at issue was unlawful when committed. See *Landgraf*, 511 U.S. at 282 n.35 ("[C]oncerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation."). See also *id.* at 281-282.

Section 1231(a)(5) retroactively alters the legal consequences of his completed act of illegal reentry, the relevant question is what forms of discretionary relief were available to him *at the time of that reentry*, not at the time of his eventual removal. Petitioner, at the time of his illegal reentry, could have had no reasonable reliance on any of the forms of relief he now seeks to invoke.

(1) *Adjustment of Status.* Illegal entrants (and reentrants) were categorically ineligible for adjustment of status when petitioner unlawfully reentered the country in 1982. It was not until 1994 that Congress first made adjustment of status available to illegal entrants. See 8 U.S.C. 1255(i) (1994) (enacted by Act of Aug. 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1765). Even then, the provision took effect on October 1, 1994, but was to sunset on October 1, 1997. See § 506(c), 108 Stat. 1766.[15]

The result is that the only class of pre-IIRIRA illegal reentrants who could even conceivably assert reliance on the potential availability of adjustment of status under petitioner's theory would be those—unlike petitioner—whose illegal reentry occurred during the period after October 1, 1994, and before IIRIRA's enactment on September 30, 1996. Even aliens in that limited category were not automatically eligible for adjustment at the time of illegal reentry. Rather, adjustment was conditioned on the alien's establishing admissibility to the United States and becoming eligible to receive an immigrant visa—for instance, by becoming married to a United States citizen—and doing so before the sunset date of

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[15] Congress later twice extended the sunset date to encompass aliens as to whom a family-based visa petition or application for labor certification was filed by April 30, 2001. See 8 U.S.C. 1255(i)(1)(B). Both of those extensions, however, were enacted after IIRIRA's effective date of April 1, 1997. See Act of Nov. 26, 1997, Pub. L. No. 105-119, § 111(a)-(b), 111 Stat. 2458; Pub. L. No. 106-554, § 1(a)(4) [Div. B, Tit. XV, § 1502(a)(1)], 114 Stat. 2763A-324 (2000).

the provision. See 8 U.S.C. 1255(i)(2)(A) (1994). For those reasons, there is no basis for concluding that pre-IIRIRA illegal reentrants like petitioner could have reasonably relied on the prospect of obtaining adjustment of status.

Moreover, "adjustment of status is merely a *procedural mechanism* by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601 (BIA 1992) (emphasis added). Before Congress created the mechanism of adjustment of status, "aliens in the United States who were not immigrants had to leave the country and apply for an immigrant visa at a consulate abroad." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). Under the adjustment-of-status procedure, an alien already in the United States is treated as if he were seeking admission from abroad but is permitted to remain here while the application is pending. See *ibid.*; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964); *In re S—*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

Adjustment of status thus is a "wholly procedural" mechanism, under which "the alien must still satisfy applicable substantive standards and persuade the Attorney General to exercise his discretion favorably." *Tibke*, 335 F.2d at 45. Because the adjustment-of-status procedure ultimately affects the procedures by which, and the location from which, an alien may seek discretionary admission into the country— and not his substantive entitlement to admission—Section 1231(a)(5)'s denial of eligibility for adjustment is not retroactive. See *Landgraf*, 511 U.S. at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.")[16]

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[16] In this case, for instance, if the government prevails and petitioner's removal is thus upheld, petitioner could seek admission from Mexico in lieu of seeking adjustment of status from within the United States. If petitioner's wife obtains approval of a family-based visa petition filed on his behalf, see 8 U.S.C.

(2) *Cancellation of Removal.* Eligibility for cancellation in the case of a non-permanent resident alien is conditioned, *inter alia*, on maintaining continuous physical presence in the United States for at least ten years. 8 U.S.C. 1229b(b)(1)(A). Before IIRIRA, the continuous-presence requirement for suspension of deportation—the precursor to cancellation of removal for non-permanent resident aliens—was seven years. See 8 U.S.C. 1254(a)(1) (1994). Consequently, at the time that petitioner and other pre-IIRIRA illegal reentrants decided to

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1154(a)(1)(A)(i); 8 C.F.R. 204.2(a), petitioner could then apply for an immigrant visa in Mexico, the grant of which would permit him to return to the United States as a lawful permanent resident. See 8 U.S.C. 1201, 1202. Although the grant of a visa application is discretionary, the grant of adjustment of status also is discretionary, see 8 U.S.C. 1255(a), and the likelihood of obtaining discretionary admission through a visa application generally does not differ from the likelihood of obtaining discretionary adjustment of status.

Petitioner's removal also would trigger two separate constraints on admission that were enacted by IIRIRA. First, petitioner would face a default 20-year inadmissibility period because he would have been removed a second or successive time. See 8 U.S.C. 1182(a)(9)(A)(i). That default bar, however, is subject to waiver if the Secretary of Homeland Security consents to the alien's reapplying for admission. 8 U.S.C. 1182(a)(9)(A)(iii). And because the standard for that discretionary waiver does not differ from the discretionary decision whether to grant adjustment of status, the application of Section 1182(a)(9)(A) ultimately would not affect petitioner adversely as compared with applying for adjustment of status from within the United States.

Petitioner also would face a default 10-year admission bar under 8 U.S.C. 1182(a)(9)(B)(i)(II), based on his accumulation of more than one year of unlawful presence following IIRIRA's effective date. That provision is also subject to waiver by the Secretary of Homeland Security, but waiver would require demonstrating that refusal of admission to petitioner "would result in extreme hardship" to his wife. 8 U.S.C. 1182(a)(9)(B)(v). Although that waiver standard would impose a heightened standard that petitioner would not confront if he were permitted to seek adjustment of status, its application raises no issue of retroactive unfairness. That added burden arises only by virtue of petitioner's continued unlawful presence in the United States *after* IIRIRA's effective date, see IIRIRA § 301(b)(3), 110 Stat. 3009-578, and petitioner was on notice of that consequence from the time of IIRIRA's enactment.

reenter the country unlawfully, they were ineligible for suspension of deportation and would remain ineligible for at least seven years. Because illegal reentrants were categorically ineligible for suspension at the time of their reentry, Section 1231(a)(5) did not change the legal consequences of their act of illegal reentry vis-a-vis their ability to seek suspension of deportation (or, now, cancellation of removal).

In addition, cancellation of removal requires an alien without lawful status to establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(D). Suspension of deportation correspondingly required an alien without lawful status to establish that removal would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1) (1994). There would have been no basis for an illegal reentrant to form any settled expectation, at the time of his illegal reentry, that he would be in a position to make those sorts of showings if he later satisfied the applicable continuous-presence requirement.

(3) *Voluntary Departure.* Petitioner also argues that, at the time of his illegal reentry, he was eligible to seek voluntary departure in lieu of removal if his unlawful presence were to be discovered. The notion that an alien's decision to commit a criminal reentry could have been made in reliance on the potential availability of voluntary *departure* if he was detected and ordered removed is farfetched to say the least.

Voluntary departure would not have permitted the alien to remain in the United States. In light of the substantial risks assumed by aliens in committing the crime of illegal reentry precisely to enable a return to the United States, there is little basis for supposing that their decision to reenter

could be grounded in expectations about the means by which they might later be required to leave. Moreover, an illegal reentrant's demonstrated unwillingness to abide by his prior removal order would have made him an unlikely candidate to receive discretionary permission to depart the country voluntarily. See, *e.g.*, *In re Flores*, 17 I. & N. Dec. 225, 229 (BIA 1980) (holding that alien "has not shown himself to be deserving of" voluntary departure because of, *inter alia*, "[h]is history of entering the United States without inspection"); *In re Gamboa*, 14 I. & N. Dec. 244, 248 (BIA 1972) (considerations that determine whether voluntary departure is warranted include "the alien's prior immigration history, the nature of his entry or entries," and "his violations of the immigration and other laws, and the like").[17]

***b. Petitioner's retroactivity claim materially differs from the one addressed in* INS *v.* St. Cyr**

Petitioner errs in his reliance (Pet. Br. 44, 47-48, 49-50) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved IIRIRA's elimination of discretionary relief from removal under former Section 212(c) of the INA for aliens who had been affirmatively granted the status of aliens lawfully admit-

[17] Even assuming, *arguendo*, that aliens who illegally reentered the country before IIRIRA could be said to have done so in reasonable reliance on the possibility of obtaining voluntary departure—and also assuming that the elimination of eligibility for voluntary departure would constitute a retroactive effect—the remedy would be to permit aliens who unlawfully reentered before IIRIRA to seek voluntary departure under their reinstated order of removal in lieu of removal under that order. Petitioner appears to assume that, if the elimination of eligibility for voluntary departure were retroactive in effect, aliens who had illegally reentered before IIRIRA would then be free to seek *any* sort of discretionary relief, not just voluntary departure. See Pet. Br. 38-39, 42-44. There could be no basis for granting that windfall. A conclusion that Section 1231(a)(5) is retroactive as to one form of relief would not open a gateway to permit aliens to seek any and all other forms of relief, even relief as to which aliens were categorically ineligible when they illegally reentered.

ted for permanent residence, see 8 U.S.C. 1101(a)(20) (definition of "lawfully admitted for permanent residence"), but who were thereafter convicted of an aggravated felony. The Court held that the elimination of eligibility for Section 212(c) relief had a retroactive effect in the case of a lawful permanent resident who had pleaded guilty to the commission of an aggravated felony before IIRIRA. 533 U.S. at 321-325.

The Court based that conclusion in part on the premise that, before IIRIRA, permanent resident "aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief." 533 U.S. at 325. The Court explained that the decision to plead guilty entails the waiver of several constitutional rights, *id.* at 321-322, and that "preserving the possibility of [Section 212(c)] relief would have been one of the principal benefits sought by defendants in deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. The Court reasoned that lawful permanent residents who pleaded guilty and received a sentence that preserved their eligibility for Section 212(c) relief "almost certainly relied upon [the] likelihood" of obtaining such relief "in deciding whether to forgo their right to a trial." *Id.* at 325; see *id.* at 323. The Court thus held that "the elimination of any possibility of § 212(c) relief by IIRIRA" contravened principles of reasonable reliance and settled expectations. *Id.* at 325; see *id.* at 323-324.

There is no similarity between *St. Cyr* and this case. *St. Cyr* was grounded in the notion that, because aliens had based their decision to plead guilty on the continued availability of Section 212(c) relief, the plea of guilty gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. Cf. *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (plea of guilty "must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences") (internal quotation marks omitted). The Court therefore held that IIRIRA attached new legal conse-

quences to the completed transaction of entering a plea of guilty, see *St. Cyr*, 533 U.S. at 321—a transaction that occurred after the alien was lawfully admitted for permanent residence and thus was formally accorded the expectation that he would be permitted to remain in the country.

In this case, by contrast, no transaction or event akin to a guilty plea (and the concomitant waiver of rights) that occurred after petitioner reentered the United States could even arguably be said to have independently given rise to reasonable reliance interests and settled expectations. Petitioner's claim instead is that his criminal act of reentering the country itself engendered cognizable expectations and reliance interests. *St. Cyr* affords no support for that claim.[18]

Indeed, petitioner's claim is far less persuasive even than the contention that IIRIRA's elimination of Section 212(c) relief would produce a retroactive effect if applied to a permanent resident alien who had committed an aggravated felony—as opposed to entered a plea of guilty to commission of such a felony—before IIRIRA. In that situation, the alien would have committed a criminal offense that presented grounds for removing him from the country, but would have retained eligibility before IIRIRA to seek discretionary relief from removal. Lower courts have uniformly rejected the suggestion that IIRIRA's repeal of Section 212(c) relief could

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[18] The circumstances in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), are like those in *St. Cyr* in that there was an independent source for the alien's legitimate expectation that he would be admitted to the United States. The Court held in *Chew Heong* that a statute barring Chinese nationals from reentering the United States without a certificate prepared for them on their departure was not applicable to a Chinese laborer who had left the United States before the statute was enacted. There was no reason at that time to suppose that a certificate would be required for reentry. In fact, the Court explained, the laborer had a "vested" right to reenter the country under a treaty that gave Chinese nationals the right to leave and return to the United States at their pleasure. *Id.* at 559.

raise retroactivity concerns simply because it is applied to a permanent resident alien who had committed an aggravated felony before IIRIRA was enacted.[19] In fact, the Second Circuit's decision in *St. Cyr*, which this Court affirmed, explained that it "would border on the absurd to argue that * * * aliens might have decided not to commit drug crimes * * * had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418-419 (2d Cir. 2000) (internal quotation marks omitted), aff'd, 533 U.S. 289 (2001). That rationale applies *a fortiori* to petitioner's claim that Section 1231(a)(5) retroactively alters the legal consequences of his act of illegal reentry.

Finally, as noted above, *St. Cyr* involved discretionary relief available to lawful permanent residents. The result of obtaining Section 212(c) relief was that the "deportation proceeding is terminated and the alien *remains a permanent resident.*" 533 U.S. at 295 (emphasis added). Cf. *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."). Any cognizable expectation in remaining in the country that accompanies achieving status as a lawful permanent resident has no force with respect to an alien who enters (or reenters) the country illegally and maintains an unlawful presence. Such an alien has never been accorded the lawful status under the immigration laws that is an essential

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[19] See *Evangelista* v. *Ashcroft*, 359 F.3d 145, 154-156 (2d Cir. 2004), cert. denied, 125 S. Ct. 1293 (2005); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See also *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam) (rejecting analogous argument under AEDPA), cert. denied, 539 U.S. 926 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (same), cert. denied, 539 U.S. 902 (2003).

prerequisite for claiming the protection afforded by principles of non-retroactivity against changes in those laws.

c. Petitioner's actions after his illegal reentry cannot give rise to reasonable reliance interests

Although petitioner's principal claim is that Section 1231(a)(5) attached new legal consequences to his completed act of illegal reentry, petitioner also argues that events after his reentry gave rise to expectations that he could obtain discretionary relief. Petitioner, for instance, observes that, because he maintained unlawful presence for a continuous period of seven years after his illegal reentry in 1982, he became eligible to seek suspension of deportation in 1989 under the then-existing suspension statute. Pet. Br. 38. Petitioner further notes that he fathered a citizen-son in 1989, and that hardship to his son could have been a favorable consideration in any application for suspension of deportation. *Id.* at 40-41. Petitioner also observes that, upon his marriage to a United States citizen in 2001—after IIRIRA's effective date—he gained eligibility to seek adjustment of status. *Id.* at 38.

i. There could be no claim that petitioner married in reliance on the availability of discretionary relief, given that the marriage occurred nearly four years after IIRIRA's effective date. Petitioner does not indicate which, if any, of the other post-reentry events he cites—*e.g.*, his remaining in the country unlawfully for the seven-year period required to qualify for suspension of deportation, or his fathering a citizen-son—could have been undertaken in reliance on his eligibility for discretionary relief. Petitioner, for instance, makes no suggestion that any post-reentry action or event would have been different had he known that he would be ineligible for discretionary relief from removal. Compare, *e.g.*, *St. Cyr*, 533 U.S. at 323-325 (aliens detrimentally relied on eligibility for Section 212(c) relief in electing to plead guilty and forgo right

to trial). Accordingly, the post-reentry events identified by petitioner—like the act of illegal reentry itself—do not implicate the "aim of the [*Landgraf*] presumption" of avoiding "changes to legal rules on which parties relied in shaping their primary conduct." *Altmann*, 541 U.S. at 696.

Petitioner, at any rate, cannot assert *reasonable* reliance based on those sorts of events that transpired after his illegal reentry. Principles of non-retroactivity and the analytical framework of the Court's cases such as *Landgraf* were not intended to legitimize any claimed expectations of aliens who resort to self-help by bringing themselves unlawfully within the territorial application of United States law to begin with. To conclude otherwise would convert the presumption against retroactivity from a shield that protects persons from new and unfair consequences for past acts or transactions that occurred in the United States into a sword that an illegal entrant or reentrant can wield in an effort to defeat reasonable measures enacted by Congress, in the exercise of its plenary control over the Nation's borders, to remove aliens who have not affirmatively been granted any right to return.

Reasonable reliance is "a legal construct designed to protect against unfairness." *Altmann*, 541 U.S. at 711 (Breyer, J., concurring). There is no unfairness in declining to take into consideration events whose occurrence was predicated on continuation of the unlawfulness of petitioner's reentry and continued presence. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) ("[I]n all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law."). Petitioner had no protected interest in continuing to violate the law unabated, and there is no basis for recognizing claims of reasonable reliance that accrued only by virtue of petitioner's continued ability to avoid detection. Cf. *United States* v. *Boyd*, 149 F.3d 1062, 1068 (10th Cir. 1998) (noting settled rule that "when a crime

involves a continuing violation, application of a law enacted after the crime begins does not implicate the ex post facto clause"), cert. denied, 526 U.S. 1147 (1999).

Petitioner's position, in this respect, is no different than that of any alien who unlawfully entered the country at a time when the rules governing discretionary relief were more generous, and who claims that those rules became ossified at that time such that he retains presumptive immunity from any subsequent restrictions on relief. IIRIRA, for instance, increased the continuous-presence requirement to obtain suspension of deportation (renamed cancellation of removal in IIRIRA) from seven to ten years. An alien who had illegally reentered the country before IIRIRA could make no persuasive claim that he possessed an ongoing entitlement to seek discretionary relief after seven years instead of being subject to the ten-year period imposed by IIRIRA. See *Jimenez-Angeles* v. *Ashcroft*, 291 F.3d 594, 601-602 (9th Cir. 2002) (rejecting claim that it would be retroactive to impose the ten-year physical-presence requirement against an alien who had accumulated seven years of unlawful presence by the time of IIRIRA's enactment); see also *Karageorgious* v. *Ashcroft*, 374 F.3d 152, 155-156 (2d Cir. 2004) (rejecting claim that IIRIRA's standards for cancellation of removal are retroactive when applied to aliens who would have qualified for suspension of deportation under less restrictive pre-IIRIRA standards). Although IIRIRA's increase in the continuous-presence requirement rendered ineligible for relief certain aliens who would have been eligible under pre-IIRIRA rules, the increase uncontroversially applies to such aliens. Section 1231(a)(5) has the same effect on petitioner, and its application to him is equally uncontroversial.[20]

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[20] Petitioner, for instance, observes that, in 1989, he had satisfied the then-applicable requirement that he maintain seven years of continuous presence to qualify for suspension of deportation, and he could have sought suspension at

ii. Petitioner's claims of reasonable reliance on events that transpired after his illegal reentry is also misconceived because that approach would call for a highly individualized retroactivity inquiry turning on the particular factual circumstances faced by specific aliens. The inquiry could depend, for instance, on whether a particular illegal reentrant had surpassed the continuous-presence requirement for cancellation of removal before IIRIRA's effective date; had developed family ties within the United States of a character that would implicate the hardship showing required to obtain cancellation; or had become married to a United States citizen before IIRIRA's effective date so as to become eligible to seek adjustment of status. See Pet. Br. 38-41.

That manner of individualized inquiry not only would raise problems of administration, but it also would contradict the approach applied by this Court. The Court has not applied retroactivity analysis at a level of specificity turning on each person's individual circumstances. Rather, the Court has considered whether a statute is applicable to a *general class* of claims or individuals. See, *e.g.*, *St. Cyr*, 533 U.S. at 321-325 (applicability of IIRIRA's repeal of relief to aliens who had pleaded guilty before IIRIRA); *Martin*, 527 U.S. at 343 (ap-

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that time (presumably by presenting himself to INS authorities to be placed in deportation proceedings, in which he could have then sought suspension of deportation). Pet. Br. 41. Petitioner, however, elected not to seek suspension but instead to continue his unlawful presence. He cannot now make a claim of reasonable reliance premised on the previous availability of suspension of deportation, relief he elected not to seek. Petitioner's circumstances are indistinguishable from those of an illegal entrant who had satisfied the seven-year requirement for suspension at the time of IIRIRA's effective date but elected not to seek suspension. Such an alien, after IIRIRA, could not claim immunity from the ten-year period required to qualify for cancellation of removal, even if application of the ten-year period would render him ineligible for relief. See *Jimenez-Angeles*, 291 F.3d at 601-602. Petitioner can no more claim immunity from Section 1231(a)(5)'s denial of discretionary relief.

plicability of PLRA to pre-PLRA and post-PLRA attorney work); *Lindh*, 521 U.S. at 320 (applicability of AEDPA to cases pending on effective date); *Landgraf*, 511 U.S. at 244 (applicability of amendments to Title VII to cases pending on effective date). That approach reflects the ultimate object of the retroactivity inquiry, *viz.*, to determine Congress's intent concerning the temporal reach of the statute. There is no reason to suppose that Congress intended for Section 1231(a)(5)'s applicability to turn on the particular post-reentry events that may have affected a specific alien.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 8 U.S.C. 1182 provides, in pertinent part:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(9) Aliens previously removed

(A) Certain aliens previously removed

* * * * *

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

* * * * *

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible

* * * * *

(v) Waiver

The Attorney General has sole discretion to waive clause (I) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would

result in extreme hardship to the citizen or lawfully resident spouse or parents of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

* * * * *

2. 8 U.S.C. 1229b provides, in pertinent part:

§ 1229b. Cancellation of removal; adjustment of status

* * * * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney

General exercises discretion to grant a waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

3. 8 U.S.C. 1229c provides, in pertinent part:

§ 1229c. Voluntary departure

* * * * *

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntary to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under Section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

* * * * *

4. 8 U.S.C. 1231 provides, in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

* * * * *

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

* * * * *

5. 8 U.S.C. 1255 provides, in pertinent part:

§ 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

* * * * *

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

* * * * *

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or status to that of an alien lawfully admitted for permanent residence. * * *

* * * * *

6. 8 U.S.C. 1325 provides, in pertinent part:

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Improper time or place; civil penalties

Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration offices shall be subject to a civil penalty of —

(1) at least $50 and not more than $250 for each such entry (or attempted entry); or

(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed

* * * * *

7. 8 U.S.C. 1326 provides, in pertinent part:

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United State or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

* * * * *

8. Section 105 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-556, provides, in pertinent part:

SEC. 105. CIVIL PENALTIES FOR ILLEGAL ENTRY

(a) IN GENERAL.—Section 275 [of the Immigration and Nationality Act (INA)] (8 U.S.C. 1325) is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of—

"(1) at least $50 and not more than $250 for each such entry (or attempted entry); or

"(2) twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.

Civil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed."

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to illegal entries or attempts to enter occurring on or after the first day of the sixth month beginning after the date of the enactment of this Act.

9. Section 324 of IIRIRA (110 Stat. 3009-629) provides, in pertinent part:

SEC. 324. PENALTY FOR REENTRY OF DEPORTED ALIENS

(a) IN GENERAL.—Section 276(a)(1) [of the INA] (8 U.S.C. 1326(a)(1)) is amended to read as follows:

> "(1) has been arrested or deported, has been excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding, and thereafter".

* * * * *

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to departures that occurred before, on, or after the date of the enactment of this Act, but only with respect to entries (and attempted entries) occurring on or after such date.

10. The Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, § 202, 111 Stat. 2193 (1997) (8 U.S.C. 1255 note), as amended, provides, in pertinent part:

"(a) ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The status of any alien described in subsection (b) shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if the alien—

"(A) applies for such adjustment before April 1, 2000; and

"(B) is otherwise admissible to the United States for permanent residence * * * .

"(2) RULES IN APPLYING CERTAIN PROVISIONS.—In the case of an alien described in subsection (b) or (d) who is applying for adjustment of status under this section—

"(A) the provisions of section 241(a)(5) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(5)] shall not apply; and

* * * * *

"(b) ALIENS ELIGIBLE FOR ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The benefits provided by subsection (a) shall apply to any alien who is a national of Nicaragua or Cuba, and who has been physically present in the United States for a continuous period, beginning not later than December 1, 1995, and ending not earlier than the date the application for adjustment under such subsection is filed, * * * .

* * * * *

11. The Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, § 101(h) (Tit. IX, § 902), 112 Stat. 2681-538 (1988) (8 U.S.C. 2255 note), as amended, provides, in pertinent part:

"(a) ADJUSTMENT OF STATUS.—

"(1) IN GENERAL.—The status of any alien described in subsection (b) shall be adjusted by the Attorney General to that of an alien lawfully admitted for permanent residence, if the alien—

"(A) applies for such adjustment before April 1, 2000; and

"(B) is otherwise admissible to the United States for permanent residence * * *.

"(2) INAPPLICABILITY OF CERTAIN PROVISIONS.—In the case of an alien described in subsection (b) or (d) who is applying for adjustment of status under this section—

"(A) the provisions of section 241(a)(5) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(5)] shall not apply; and

* * * * *

"(b) ALIENS ELIGIBLE FOR ADJUSTMENT OF STATUS.—The benefits provided by subsection (a) shall apply to any alien who is a national of Haiti who—

* * * * *

"(2) has been physically present in the United States for a continuous period beginning not later than December 31, 1995, and ending not earlier than the date the application for such adjustment is filed, * * * .

* * * * *

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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Although the government strives to defend the Tenth Circuit's decision, it is clear that INA § 241(a)(5) was not intended to apply, and may not be applied, to deprive petitioner of the right to seek discretionary relief from removal.

I. The Government's Arguments Are Based On A Fundamental Misconception About INA § 241(a)(5).

The government repeatedly relies on a foundational assumption that cannot withstand scrutiny—that INA § 241(a)(5) does not regulate the act of illegal reentry but instead regulates only the process of removal. See, *e.g.*, Resp. Br. 6, 11, 13, 14–15, 29, 31. But the salient aspect of INA § 241(a)(5) for purposes of this litigation is the provision specifying that an alien who has illegally reentered the United States after a prior deportation "is not eligible and may not apply for any relief under [the INA]." See Resp. Br. 4 & n.2. That provision, by penalizing those who reenter after removal, regulates reentry.

a. Hoping to avoid the presumption against retroactivity, the government characterizes INA § 241(a)(5) as purely procedural. See, *e.g.*, Resp. Br. 6–7; cf. *Landgraf*, 511 U.S. at 275 ("[c]hanges in procedural rules may often be applied * * * without raising concerns about retroactivity"). But although certain aspects of INA § 241(a)(5) govern reinstatement procedures, the salient provision effected a *substantive* change in law that clearly *penalizes* those who illegally reenter the United States after having been previously removed.[1] See Part III, *infra*. Indeed, in an interim rule implementing IIRIRA, the INS itself explained that "review of the relevant statutory provisions reveals that a *substantive change* was in fact effected in the transition from section 242(f) of the Act to section 241(a)(5) of the Act."[2] 62 Fed. Reg. 10,312,

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[1] Each of the statute's distinct provisions must be separately scrutinized for purposes of retroactivity analysis. See *Landgraf*, 511 U.S. at 280; *Alvarez-Portillo*, 280 F.3d at 865.

[2] The government has taken the same position in other litigation. See, *e.g.*, Gov't Br. in *Velasquez-Gabriel*, 2000 WL 33988616, at *32 ("To

10,326 (Mar. 6, 1997) (emphasis added).[3]

b. The government also argues that INA § 241(a)(5) regulates merely *reinstatement*, not *reentry*. See Resp. Br. 6, 11, 13, 29. But as the government has repeatedly acknowledged, in enacting INA § 241(a)(5) "Congress clearly attempted to address the problem of illegal entry, and particularly to deter repeated illegal reentry by aliens who have already been removed." Gov't Br. in *Sarmiento Cisneros*, 2004 WL 3557971, at *46 n.12.[4] Inasmuch as INA § 241(a)(5) was concededly intended to "address" and "deter" illegal reentry—by setting higher penalties for such conduct—it plainly regulates that primary conduct.

c. Relatedly, the government's assertion that INA § 241(a)(5) is, for purposes of retroactivity analysis, triggered not by the reentry itself but instead by the Attorney General's "finding" of reentry, see Resp. Br. 13, does not withstand scrutiny. As an initial matter, the regulation implementing INA § 241(a)(5) leaves no doubt that the provision is triggered by reentry.[5] The regulation does not mention the Attor-

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address the serious problem of illegal reentries, Congress sought to make a substantive change when it enacted Section 241(a)(5) by precluding an illegally reentering alien's eligibility for relief from deportation.").

[3] The government suggests that its characterization of INA § 241(a)(5) as purely procedural is bolstered by the subsection's placement within the INA. See Resp. Br. 31. But while much of INA § 241 addresses procedural matters, the bar on deportation relief in INA § 241(a)(5) is by no means the only substantive provision in INA § 241. See, *e.g.*, INA § 241(a)(4)(D) ("No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien."); § 241(a)(6) (allowing government to detain certain aliens "beyond the removal period"); § 241(b)(3)(A) (prohibiting Attorney General from removing alien to country where alien's life or freedom would be threatened).

[4] See also, *e.g.*, Gov't Br. in *Ojeda-Terrazas*, 2001 WL 34090034, at *5; Gov't Br. in *Alvarez-Portillo*, 2001 WL 34095765, at *7.

[5] Indeed, the government previously told both the Fifth and Eighth Circuits that INA § 241(a)(5) "is directed at two events," namely "the prior

ney General at all, instead specifying that the provision applies to any "alien who illegally reenters the United States after having been removed," and requiring that an immigration officer determine "[w]hether the alien unlawfully reentered the United States." 8 C.F.R. § 241.8(a)(1).

Furthermore, the government's position is inconsistent with this Court's decision in *St. Cyr*. The petitioner in *St. Cyr* had been eligible for relief from deportation under INA § 212(c) before IIRIRA, but the decision to grant such relief lay entirely within "'the discretion of the Attorney General,'" *St. Cyr*, 533 U.S. at 295 (quoting INA § 212(c) (1996)), who had not exercised that discretion as of the day that IIRIRA took effect. Nonetheless, this Court held that application of IIRIRA, which would have made the petitioner ineligible for such discretionary relief, would be impermissibly retroactive. That result forecloses the government's argument here: If the government were correct that the triggering event for retroactivity purposes is action by the Attorney General, then *St. Cyr* would necessarily have come out the other way because the Attorney General had not acted before IIRIRA took effect.

Indeed, the government's position as to the relevant triggering event is at odds with basic principles of retroactivity analysis. On the government's theory, a statute is, for retroactivity purposes, triggered not by the actor's primary conduct, but rather by the fact-finder's subsequent determination of culpability. This, however, is true neither in the criminal context, see, *e.g.*, *Miller* v. *Florida*, 482 U.S. 423 (1987) (prohibiting application of statute enacted after crime but in effect at time of sentencing), nor in the civil context, see, *e.g.*, *Hughes Aircraft*, 520 U.S. 939 (prohibiting application of statute in effect at time of trial to conduct predating statutory enactment). Thus, there is no support for the government's argument that INA § 241(a)(5) is a procedural provision that

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order of removal and the subsequent illegal reentry." Gov't Br. in *Ojeda-Terrazas*, at *18; Gov't Br. in *Alvarez-Portillo*, at *25.

does not regulate and is not triggered by reentry.

II. Congress Intended INA § 241(a)(5) To Apply Only To Post-IIRIRA Reentrants.

As demonstrated in our opening brief, Congress intended INA § 241(a)(5) to apply only to persons who reentered the United States after IIRIRA took effect. The government disputes this proposition—and goes so far as to argue that Congress specifically intended for the statute to apply retroactively. Its arguments are baseless.

A. Congress intended INA § 241(a)(5) to apply only prospectively.

1. The foremost proof that Congress intended INA § 241(a)(5) to apply only prospectively is the comparison between that provision and its 1952 predecessor. See Pet. Br. 16-20. The government challenges the import of this comparison, arguing that "[b]ecause the 'before or after' clause [in the 1952 Act] pertained to the date of the alien's previous deportation or departure—rather than to the date of the alien's illegal reentry—the absence of such language in [INA § 241(a)(5)] in no way suggests that Congress sought to draw a distinction based on the timing of illegal reentry." Resp. Br. 20. But the government's quibble over the precise meaning of the "before or after" clause misses the point.

Although the government may be correct that the "before or after" clause in the 1952 provision related to deportations rather than reentries, the elimination of that clause nonetheless demonstrates that INA § 241(a)(5) must be interpreted not to apply to aliens who reentered before April 1, 1997. By eliminating the "before or after" clause, Congress deliberately removed the express retroactivity language that it had previously understood was necessary for a reinstatement provision to apply to pre-enactment conduct. Consistent with the default rule against retroactivity, the INS interpreted the 1950 statute—which contained no specific temporal restriction—to apply strictly prospectively, *i.e.* only to aliens who were deported, and thus also reentered, after its enactment. In the

1952 statute, Congress, evidently dissatisfied with that result, expressly commanded—through adoption of the "before or after" clause—that the new reinstatement provision be retroactively applied to pre-enactment deportations. But in enacting INA § 241(a)(5) in 1996, Congress *eliminated* the very language that made the 1952 Act retroactive. The clear implication is that Congress, in eliminating the language it had introduced in 1952, intended that INA § 241(a)(5), like the 1950 provision, not be applied to pre-enactment conduct.[6]

Moreover, far from advancing the government's position, the implication of its argument is that INA § 241(a)(5), like its 1950 precursor, may not be applied to an alien who was *deported* before its enactment, let alone to one who reentered before that date. Reentry necessarily follows deportation. Thus, if the deportation must have occurred after enactment of the reinstatement provision, *a fortiori* the reentry must also have occurred thereafter. The government's effort to avoid this logical corollary, see Resp. Br. 21 n.6, mistakenly assumes that petitioner can prevail only if the negative inference derived from Congress's elimination of the "before or after" clause relates directly to an immigrant's illegal reentry. Thus, even if the government's interpretation of the "before or after" clause were accepted, petitioner would still prevail, as he was deported 15 years before IIRIRA's enactment.

2. As explained in our opening brief, see Pet. Br. 21–22,

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[6] The government argues that Congress removed the retroactivity language from the prior reinstatement provision because, by 1996, "there was no enduring need to maintain the specification that the reinstatement authority encompasses aliens whose previous deportation or departure was 'before * * * June 27, 1952.'" Resp. Br. 21. This argument is a red herring. The government mistakenly quotes the *codified* version of the prior reinstatement provision, which references "June 27, 1952." The version enacted by Congress specified, however, that it applied to reentries whether "before or after *the date of enactment of this Act*." Pub. L. No. 82-414 § 242(f); 66 Stat. 163, 212 (1952) (emphasis added). Thus, had Congress intended the expanded reinstatement provision to apply retroactively, it would have retained this clause from the prior provision.

the legislative history, too, reveals that Congress intended INA § 241(a)(5) to apply only prospectively. Although the government contends that "[p]etitioner's argument rests on a clear misunderstanding of the legislative history," Resp. Br. 22, the history that it recounts is identical to what we outlined: Before adopting what became INA § 241(a)(5), Congress considered a Senate bill that would have left the text of the former reinstatement provision unchanged.[7] Yet rather than accept the Senate proposal, Congress instead adopted a House bill that expanded the scope of reinstatement but—critically for current purposes—also eliminated the express retroactivity language that had been contained in the 1952 provision. That elimination must be given effect. See Pet. Br. 21–22; *Cardoza-Fonseca*, 480 U.S. at 442–443.[8]

3. The government's efforts to distinguish *Lindh* are similarly unpersuasive. In *Lindh*, this Court compared two parallel provisions enacted as part of AEDPA and inferred that Congress intended one of them to apply prospectively. See Pet. Br. 19–20. The government contends that *Lindh* is distinguishable because "the 'before or after' clause [in INA § 242(f) (1952)] pertained to a subject that was entirely distinct from the date of an alien's illegal reentry." Resp. Br. 24.

[7] The Senate bill would have renumbered INA § 242(f) to § 242(f)(1) and added a new § 242(f)(2) to impose a new 15-year criminal sentence for illegal reentry. See S. REP. NO. 104-249, at 118 (1996).

[8] The government's reliance on *Martin* to counter our legislative-history argument, see Resp. Br. 23, is misguided. In *Martin*, the petitioner argued that by moving a particular statutory provision from one section of a statute to another, when the first section had language making it applicable to pending cases and the latter did not, Congress intended not to apply the moved provision to pending cases. This Court rejected that argument, concluding that the provision "may have been moved for a variety of other reasons." 527 U.S. at 357. In enacting IIRIRA, by contrast, Congress did not simply move the reinstatement provision from one section in the statute that had retroactivity language to another section that did not: It intentionally discarded language *from within the prior provision itself* that would have made reinstatement expressly retroactive. There are simply not "a variety of other reasons" for that change.

But there can be no serious dispute that, regardless of the precise referent of the before-or-after clause, INA § 241(a)(5) and its 1952 predecessor address precisely the same subject—reinstatement of a prior deportation order after a subsequent illegal reentry—and that Congress expressly directed that the reinstatement provision in the earlier statute but not the latter one be applied retroactively. The point in *Lindh* was that, if "Congress was reasonably concerned to ensure that [the first statutory provision] be applied to pending cases, it should have been just as concerned about [the second statutory provision], unless it had the different intent." 521 U.S. at 329. Here, Congress "had the different intent."

4. Finally, if there were any doubt as to Congress's intent that INA § 241(a)(5) be applied only prospectively, it would be resolved in petitioner's favor by the presumption against retroactivity, Pet. Br. 24–26, and the canon that any ambiguity be resolved in favor of the alien, *id.* at 27–28.

The government argues that the default rule against retroactivity cannot be invoked in the first step of the *Landgraf* analysis because the presumption is not triggered unless a statute has a "retroactive effect." Resp. Br. 25. But *both* steps of the *Landgraf* retroactivity analysis are based on the presumption against retroactivity. Thus, the test under step one is asymmetric: To demonstrate that Congress intended strictly *prospective* application of INA § 241(a)(5), and therefore to prevail under the first prong of the *Landgraf* analysis, petitioner need not identify an express command requiring that result. Rather, because retroactive application is "disfavored," *Lindh*, 521 U.S. at 328, prospective intent can be demonstrated through the "normal rules of [statutory] construction," *id.* at 326. In fact, "a statute that is ambiguous with respect to retroactive application is construed * * * to be unambiguously prospective." *St. Cyr*, 533 U.S. at 321 n.45. By contrast, a statute will be applied retroactively under *Landgraf* step one only when "Congress has *expressly* prescribed" such application. *Landgraf*, 511 U.S. at 280 (em-

phasis added). Thus, the *only* way that the government can prevail under the first prong of *Landgraf* is to point to express retroactivity language "so clear that it could sustain only one interpretation," *Lindh*, 521 U.S. at 328 n.4—language that is absent from INA § 241(a)(5).

B. Congress did not intend INA § 241(a)(5) to apply retroactively.

Despite the ample evidence that Congress specifically intended INA § 241(a)(5) to apply only prospectively, and despite always before arguing that congressional intent as to the application of this provision is ambiguous,[9] the government now contends that Congress specifically intended the provision to apply *retroactively*. This argument is without merit.

1. The government suggests that because INA § 241(a)(5) governs reinstatement against any alien who "has reentered" the country illegally, "there is no basis for exempting from the statute's reach an alien who 'had reentered' before IIRIRA's effective date." Resp. Br. 13. But as the government itself has repeatedly emphasized, INA § 241(a)(5) begins with the phrase "[i]f the Attorney General finds that an alien has reentered." Thus, use of the present perfect—"has reentered"—is a natural consequence of the fact that the reentry will *necessarily* have occurred before the Attorney General's finding, regardless of whether the reentry occurred before or after the enactment of IIRIRA.

The government also argues that a retroactive reading of INA § 241(a)(5) "is reinforced by" the provision's prescription that an alien whose prior order of removal has been reinstated may be removed "at any time after the reentry." Resp. Br. 13. The "at any time after the reentry" language does not, however, define the temporal scope of INA § 241(a)(5); it

[9] See, *e.g.*, Gov't 10th Cir. Br. in *Fernandez-Vargas*, at 8 ("there is simply no clear evidence of whether Congress intended to apply or not to apply [INA § 241(a)(5)] to aliens who reentered the country prior to April 1, 1997"); Gov't Br. in *Faiz-Mohammad*, 2003 WL 23339842, at *11–*12 (same).

simply affirms that, when reinstatement applies, removal may be executed forthwith.

2. The government also contrasts INA § 241(a)(5) with two other IIRIRA provisions—8 U.S.C. § 1326(a) (criminalizing illegal reentry) and 8 U.S.C. § 1325(b) (imposing civil fines for illegal entry)—and argues that because they, unlike INA § 241(a)(5), are expressly prospective, a negative inference can be drawn that Congress intended INA § 241(a)(5) to be retroactive. Resp. Br. 14–16. But any such inference is foreclosed by Congress having specifically *eliminated* retroactivity language from INA § 241(a)(5)—and having done so while on notice of the "wisdom of being explicit" if it intended the statute to apply retroactively. *Lindh*, 521 U.S. at 328.[10] Further, the government's argument is based on the mistaken premise that, unlike these other provisions, INA § 241(a)(5) does not regulate primary conduct. But it *does* regulate the primary conduct of reentry, see Part I, *supra*, and as the government acknowledges, "when Congress addresses primary conduct as such, it generally does not impose new consequences on past acts." Resp. Br. 16 n.5.

3. Nor is there merit to the government's argument that "Congress's express treatment of Section 1231(a)(5) in statutes enacted since IIRIRA confirms that the provision encompasses illegal reentrants who made their unlawful reentry before IIRIRA." Resp. Br. 16. None of the statutes the government cites—NACARA, HRIFA, or the LIFE Act—supports its position.

Each of these statutes extends relief from deportation to a defined class of aliens. To be eligible for relief under any of them, an alien must have been present in the United States on a date before the enactment of IIRIRA, and must have maintained a statutorily defined continuous presence in the United

[10] Given that other provisions of IIRIRA are expressly retroactive, see Pet. Br. 25, Congress clearly knew how to overcome the presumption against retroactivity when it wanted to do so.

States thereafter.[11] As the government notes, Congress has expressly exempted aliens otherwise eligible for relief under those acts from the operation of INA § 241(a)(5). Resp. Br. 17–18. According to the government, because each act requires that an alien have maintained a continuous presence in the United States beginning at some time before IIRIRA's enactment, the exemptions "can be explained only if Section 1231(a)(5) applies to aliens who had illegally reentered the country before the enactment of IIRIRA." Resp. Br. 18.

The government is wrong: Under each statute, although aliens must have been present in the United States before IIRIRA's enactment to qualify for relief, those eligible for relief who had previously been deported but were in the United States as of the relevant cutoff date could thereafter leave and reenter the country illegally—even after IIRIRA—without losing that eligibility.[12] But INA § 241(a)(5) would, by its plain terms, preclude a person who reentered after IIRIRA from receiving such relief. Accordingly, contrary to the government's suggestion, an exemption from INA § 241(a)(5) *was* necessary if immigrants otherwise eligible for relief under those statutes were to be assured continued eligibility for relief, *even though* INA § 241(a)(5) does not apply to persons who illegally reentered the country before IIRIRA's enactment. Consequently, the statutes provide no evidence that

[11] See LIFE Act, Pub. L. No. 106-553, § 1104(c)(2)(B)(i), 114 Stat. 2762A-142, 2762A-146 (2000); HRIFA, Pub. L. No. 105-277, Tit. IX, § 902(b)(2), 112 Stat. 2681-538, 2681-539 (1998); NACARA, Pub. L. No. 105-100, Tit. II, § 202(b)(1), 111 Stat. 2193, 2194 (1998).

[12] HRIFA and NACARA each provide, in substance, that an immigrant "shall not be considered to have failed to maintain continuous physical presence by reason of an absence, or absences, from the United States for any period or periods amounting in the aggregate to not more than 180 days." HRIFA § 902(d)(2); see also NACARA § 202(b)(2). Under the LIFE Act, although an immigrant had to be continuously present in the United States between January 1, 1982, and May 4, 1988, in order to qualify for relief, the immigrant need not have been continuously present *after* 1988. LIFE Act § 1104(c)(2)(B)(i).

Congress intended INA § 241(a)(5) to apply retroactively.

4. Finally, the government does not claim that "Congress has expressly prescribed" the retroactive application of INA § 241(a)(5), *Landgraf*, 511 U.S. at 280, but, relying on *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), it nonetheless argues that "the text and structure of Section 1231(a)(5) and related statutory provisions are sufficiently clear to establish that Sections 1231(a)(5) applies to immigrants whose illegal reentry occurred before as well as after IIRIRA's effective date." Resp. Br. 28. The government's reliance on *Altmann* is misplaced. As it concedes, Resp. Br. 33 n.12, *Altmann* involved no "private rights"; rather, it addressed the Foreign Sovereign Immunities Act (FSIA), a "*sui generis* context" "not control[led]" by this Court's decision in *Landgraf*. *Altmann*, 541 U.S. at 692, 696.[13] As explained in Part I, *supra*, INA § 241(a)(5) regulates the primary conduct of reentry, not the Attorney General's subsequent finding relating thereto. By contrast, the FSIA is a jurisdictional statute and as such presumptively applies to all pending cases regardless of when the underlying primary conduct occurred. See *Landgraf*, 511 U.S. at 274. Moreover, Congress "unambiguously" provided that the FSIA would apply "henceforth" to all "[c]laims of * * * immunity," 28 U.S.C. § 1602, without regard to when the conduct giving rise to such a claim occurred. Here, there is no language in INA § 241(a)(5) that approaches even that degree of clarity with respect to retroactivity, let alone language "so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4.

[13] The presumption against retroactivity is inapplicable in the FSIA context because unlike statutes "on which parties relied in shaping their primary conduct"—such as former INA § 242(f)—"the principal purpose of foreign sovereign immunity has never been to permit foreign states * * * to shape their conduct in reliance on the promise of future immunity." *Altmann*, 541 U.S. at 696. "Rather, such immunity reflects current political realities and relationships, and aims to give foreign states some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Ibid.* (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)).

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Thus, this Court should hold that Congress intended INA § 241(a)(5) not to apply to pre-1997 reentries.

III. Application Of INA § 241(a)(5) To Pre-IIRIRA Reentrants Is Impermissibly Retroactive.

It is beyond serious dispute that INA § 241(a)(5) "attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 269-270. Before INA § 241(a)(5) took effect, petitioner was entitled to apply for discretionary relief from deportation; now, if INA § 241(a)(5) is applied to him, he is not.

We have already rebutted the government's overarching counterargument that INA § 241(a)(5) regulates the process of removal, not reentry. See Part I. Its other arguments are equally flawed. In essence, the government asserts that INA § 241(a)(5) imposes no new consequences on people who reentered before 1997. But application of the bar on discretionary relief undermines their legitimate expectation that the mere fact of reentry would not categorically preclude them from seeking discretionary relief. Indeed, even if the Court declines to approach the issue categorically, applying INA § 241(a)(5) to petitioner would impermissibly deny *him* the right to seek specific forms of discretionary relief to which he would otherwise be eligible, and would expose him to sanctions to which he would not otherwise be subject. Finally, the government's argument that illegal reentrants lack a reasonable expectation interest in any form of discretionary relief—because such relief could not have motivated their reentry and because their expectations were based on unlawful conduct—has neither factual nor legal support.[14]

[14] The government's administrative-burden argument, Resp. Br. 49, also has no merit. If the statute is viewed categorically, the only inquiry that immigration officials must make is whether an alien reentered before April 1997. Even if the Court rejects the categorical approach and concludes that the retroactivity determination depends on whether a particular individual was eligible for some form of relief before that date, the

A. The bar on discretionary relief is categorically inapplicable to aliens who reentered before IIRIRA.

INA § 241(a)(5) addresses the availability of relief from deportation in absolute terms, barring all previously removed illegal reentrants from receiving "any relief under this Act" without distinguishing among the various forms of relief that would otherwise be available. Accordingly, as we have explained, see Pet. Br. 36–38, its retroactive effect should be evaluated on a similarly categorical basis. Aliens who reentered the country before IIRIRA took effect had a legitimate expectation that *the mere fact of illegal reentry* would not itself operate as an absolute bar to relief from deportation. Although Congress could have upset that expectation, it would have needed to do so *explicitly*. Because it elected not to, INA § 241(a)(5) may not be applied to deprive someone who reentered the country before its enactment of the opportunity to seek relief merely on the basis of that reentry.[15]

B. Application of INA § 241(a)(5) to petitioner would attach new legal consequences to events completed before the statute's enactment.

In any event, application of INA § 241(a)(5) to *petitioner* would impermissibly "impair rights [he] possessed when he acted" and "increase [his] liability for past conduct." *Landgraf*, 511 U.S. at 280.

1. As we explained, see Pet. Br. 38–39, upon reentering the country in 1982, petitioner was immediately eligible for voluntary departure—a form of discretionary relief granted "in lieu of deportation," 8 U.S.C. § 1254(e)(1) (1982), that confers significant benefits on its recipient.[16] The most im-

administrative inquiry is still a ministerial one—*i.e.*, whether the individual was eligible for the relief on April 1, 1997.

[15] Contrary to the government's argument, Resp. Br. 42 n.17, petitioner does not seek a "windfall." An alien requesting discretionary relief would, of course, have to satisfy the eligibility requirements for the specific form of relief sought. The point is merely that, under *Landgraf*, reentry before April 1997 cannot *categorically* preclude all such relief.

[16] Indeed, the benefits of voluntary departure are so substantial that, as

portant benefit conferred is that a person granted voluntary departure is immediately eligible to apply for admission to the United States, whereas someone who is deported (or "removed" in post-IIRIRA terminology) is inadmissible for up to twenty years. See 8 U.S.C. § 1182(a)(6)(B) (1996); 8 U.S.C. § 1182(a)(9)(A)(ii).[17]

The government does not dispute that petitioner was, upon reentry, immediately eligible for voluntary departure, or that voluntary departure confers substantial benefits to one who would otherwise be deported. See Resp. Br. 41–42. Rather, the government argues principally that petitioner could not have reasonably relied on the availability of voluntary departure when he chose to reenter this country. *Ibid.* As we discuss below, see Part III.C, that argument is misplaced.

The government also argues that denying petitioner the opportunity to seek voluntary departure is not impermissibly retroactive because "petitioner's act of illegal reentry was not itself a 'completed' act within the meaning of *Landgraf*." Resp. Br. 36. But reentry *is* a completed act.[18] And it is the *act* of illegal reentry, rather than the *state* of being unlawfully present in the United States, that renders one ineligible for relief under INA § 241(a)(5).[19]

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part of IIRIRA, Congress specified that certain individuals may receive such relief only once. See 8 U.S.C. § 1229c(c).

[17] Further, despite the government's erroneous suggestion otherwise, see Resp. Br. 3, 14, even after IIRIRA an alien granted voluntary departure who subsequently reentered illegally would not be subject to INA § 241(a)(5) or the criminal prohibition against reentry.

[18] The government has previously acknowledged this, arguing that an alien unlawfully present by virtue of having overstayed his visa would be eligible for adjustment of status but that "[i]f, however, the alien entered the United States illegally after deportation, he would"—as a result of INA § 241(a)(5)—"be ineligible for any relief, including adjustment of status." Gov't Br. in *Castro-Cortez*, 2000 WL 34430709, at *33.

[19] Even apart from INA § 241(a)(5), other statutory provisions make clear that illegal reentry is a "completed" act. First, reentry without authorization after having previously been deported is, without more, a crime. See 8 U.S.C. § 1326(a). Second, illegal reentry itself, independent

2. Interpreting INA § 241(a)(5) to deny petitioner the right to seek cancellation of removal would also be impermissibly retroactive. See Pet. Br. 39–41. The government argues that because petitioner was ineligible for suspension of deportation for some time after his reentry, denying him the opportunity to seek such relief does not give INA § 241(a)(5) retroactive effect. Resp. Br. 40–41. This argument is based on the unstated—and incorrect—assumption that even if petitioner's reentry is a completed act to which INA § 241(a)(5) attaches new legal consequences, it is the *only* such act. As of 1989—well before IIRIRA—petitioner had, through affirmative conduct, established seven years continuous presence in the United States. Pet. App. 3a. By virtue of *that* completed act, he became entitled to seek suspension of deportation. See Pet. Br. 39–41. Applying INA § 241(a)(5) to deprive him of the opportunity to seek its successor, cancellation of removal, would therefore be impermissible.[20]

3. Denying petitioner the right to seek adjustment of status is also impermissibly retroactive. Pet. Br. 41. Although such relief was not available in 1982, Resp. Br. 38, it *was* available years before the enactment of IIRIRA, and the government ignores the fact that, but for INA § 241(a)(5), petitioner, upon marriage to a U.S. citizen, could have sought ad-

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of any ensuing unlawful presence in the United States, renders a removed person inadmissible. See 8 U.S.C. § 1182(a)(9)(A)(ii); see also Gov't Br. in *Sarmiento Cisneros*, at *46–*47 (acknowledging that "inadmissibility" is "one consequence of * * * illegal reentry").

[20] The government's argument that petitioner could have no "settled expectation" that he would ever become eligible for suspension or cancellation, Resp. Br. 41, inappropriately conflates his expectation at the time of reentry with his expectation after 1989, when he satisfied the criteria for suspension of deportation. It is also inconsistent with *St. Cyr*'s recognition that "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 325. At the time of his reentry, petitioner knew that he faced "possible" deportation, but he also knew that one reason such deportation was not "certain" was that he might eventually satisfy the criteria for suspension of deportation.

justment of status as a *defense* to deportation. Indeed, before IIRIRA, petitioner could have married his long-time partner even after initiation of deportation proceedings and then invoked this defense. See Pet. Br. 41 n.19, 43.[21]

4. The government claims that removal under INA § 241(a)(5) merely "has the effect of *undoing* the act of illegal reentry, not penalizing it." Resp. Br. 35. But as the government elsewhere concedes, petitioner's removal under INA § 241(a)(5) in fact "trigger[s] two separate constraints on admission that were enacted by IIRIRA," Resp. Br. 40 n.16, and to which petitioner was not previously subject.[22]

First, removal renders petitioner inadmissible under 8 U.S.C. § 1182(a)(9)(A)(ii).[23] Because this bar is triggered by a removal order, see *ibid.*, petitioner would not now be subject to it if he had been granted voluntary departure (which is "in lieu" of removal, 8 U.S.C. § 1229c(a)(1)), cancellation of removal, or adjustment of status.[24]

Second, removal under INA § 241(a)(5) also renders peti-

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[21] The government also argues that adjustment of status is "merely a *procedural mechanism*" governing "the location from which * * * an alien may seek discretionary admission into the country—and not his substantive entitlement to admission." Resp. Br. 39. But as the government itself acknowledges, the very act of removal alters petitioner's "substantive entitlement to admission" by rendering him statutorily inadmissible from *any* location. See Resp. Br. 40 n.16; see also pages 16-17, *infra*.

[22] Even if INA § 241(a)(5) did simply "undo" the act of illegal reentry, that would not mean that it may be applied retroactively. Restitution is, by definition, designed to "undo" the consequences of past conduct. Yet restitution orders can constitute a criminal penalty, and thus be subject to the *Ex Post Facto* Clause's ban on retroactive application. See *Pasquantino* v. *United States*, 544 U.S. 349 (2005); *United States* v. *Leahy*, __F.3d __, 2006 WL 335806, at *3–*5 (3d Cir. 2006).

[23] The government mistakenly cites to § 1182(a)(9)(A)(i), see Resp. Br. 40 n.16, which applies only to arriving aliens.

[24] This bar would render petitioner inadmissible for either 10 or 20 years. By contrast, under pre-IIRIRA law, petitioner would have been subject to at most a 5-year ban on admissibility if he had been deported. See 8 U.S.C. § 1182(a)(6)(B) (1996).

tioner inadmissible under 8 U.S.C. § 1182(a)(9)(B). The government concedes that this provision—which had no parallel under prior law—imposes an "added burden" on petitioner, but asserts that "its application raises no issue of retroactive unfairness" because "[t]hat added burden arises only by virtue of petitioner's continued unlawful presence in the United States *after* IIRIRA's effective date." Resp. Br. 40 n.16. This 10-year admissibility bar is not triggered, however, unless an alien "depart[s] or [is] remov[ed] from the United States." 8 U.S.C. § 1182(a)(9)(B)(i)(II). Thus, petitioner would not be subject to it had he been granted cancellation of removal or adjustment of status.

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In sum, applying INA § 241(a)(5) to petitioner "impair[s] rights [he] possessed when he acted" and "increase[s] [his] liability for past conduct." *Landgraf*, 511 U.S. at 280. Thus, its application to petitioner is impermissibly retroactive.[25]

C. Petitioner had a cognizable expectation that he would be eligible for relief from deportation.

The government seeks to excuse INA § 241(a)(5)'s retroactive effect on petitioner by advancing two arguments to discredit his claim of reasonable reliance on, and settled expectation in, the availability of discretionary relief from deportation. But as we explained, see Pet. Br. 46–48, petitioner

[25] Contrary to the government's suggestion, Resp. Br. 32–33, *Altmann*, which is in any event inapplicable, see page 11 & n.13, *supra*, does not in any way undermine this conclusion. Unlike the situation here, in which petitioner had a pre-existing right to seek relief from deportation and now faces increased liability for past acts, the petitioner in *Altmann*, the Republic of Austria, neither had a pre-existing right to immunity nor faced increased liability as a consequence of the FSIA. See *Altmann*, 541 U.S. at 694–695. To the extent that the government, through its reliance on *Altmann*, is implicitly suggesting that *Landgraf* is inapplicable to immigration cases, that suggestion is erroneous: This Court has consistently applied the presumption against retroactivity in the immigration context. See, *e.g.*, *St. Cyr*, 533 U.S. at 315–316; *Kessler* v. *Strecker*, 307 U.S. 22, 30 (1939); *Chew Heong* v. *United States*, 112 U.S. 536, 559 (1884).

need not prove actual reliance. The government's arguments fail, moreover, because it is entirely reasonable to assume that petitioner and others who reentered before IIRIRA and remained in the country thereafter acted, at least in part, with the legitimate expectation that they would be eligible for such relief.[26] See Pet. Br. 45–46.

1. The government first asserts that eligibility for discretionary relief from deportation could not possibly have motivated petitioner and others to act given the danger of criminal prosecution. Resp. Br. 37. But the actual threat of criminal sanction for reentry before IIRIRA was *extremely* remote. In 1982—the year petitioner reentered the United States—the INS located 970,246 deportable aliens, but only 10,058, or 1.04%, were convicted of immigration violations. In 1996—the last full year before IIRIRA took effect—the INS located 1,649,986 deportable aliens, but only 12,086, or 0.73%, were convicted of immigration violations.[27]

These low conviction rates reflect the fact that, before IIRIRA, discretionary relief was the rule rather than the exception: In 1982, the year of petitioner's reentry, the INS granted voluntary departure to 812,572 deportable aliens, or

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[26] Migration is "an investment decision." Gordon H. Hanson & Antonio Spilimbergo, *Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border*, 89 AM. ECON. REV. 1337, 1338 n.5 (Dec. 1999). As such, "[p]otential migrants estimate the costs and benefits" of migration, and in so doing consider "the likelihood of being able to avoid deportation." Douglas S. Massey, *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 434 (Sept. 1993).

[27] Even these numbers exaggerate the risk of prosecution for illegal reentry. In 1982, only 341 people, or 0.035% of the deportable aliens located in the US that year, were convicted of illegal reentry after deportation. In 1996, only 2,331 people, or 0.14%, were similarly convicted. Moreover, those who were convicted of an immigration violation faced comparatively light sentences of, on average, approximately 6 months in both 1982 and 1996. See 1985 STATISTICAL YEARBOOK OF THE INS 176, 213 (1986); 1996 STATISTICAL YEARBOOK OF THE INS 173 (1997); 1998 STATISTICAL YEARBOOK OF THE INS 207, 235 (2000).

83.7% of those it located; it deported only 14,518, or 1.5%. In 1996, the year before IIRIRA took effect, the INS granted voluntary departure to 1,572,798 people, or 95.3% of those it located, and granted suspension of deportation to an additional 5,812 people; it deported only 50,064.[28] Weighing the minimal risk of criminal sanctions that deportable aliens faced against the high likelihood of relief from deportation, it would have been entirely reasonable for petitioner to act in the expectation of receiving such relief.

2. The government also argues that, regardless of actual motivation, petitioner, by virtue of his unlawful conduct, had no legitimate expectation in relief from deportation. Resp. Br. 11, 35. But the fact that petitioner reentered the country illegally and remained here unlawfully does not undermine the legitimacy of the settled expectation of eligibility to seek such relief. This Court has consistently recognized that, "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35. See also *St. Cyr*, 533 U.S. at 325;[29] *Hughes Aircraft*, 520 U.S. at 952. Indeed, the *Ex Post Facto* Clause and the antecedent principle of *nulla poena sine lege*, from which the presumption against retroactivity is derived, see *Landgraf*, 511 U.S. at

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[28] 1996 YEARBOOK 173; 1998 YEARBOOK 28.

[29] Trying to distinguish *St. Cyr*, the government argues that "[i]n this case, by contrast, no transaction or event akin to a guilty plea * * * that occurred after petitioner reentered the United States could even arguably be said to have independently given rise to reasonable reliance interests and settled expectations." Resp. Br. 44. That is incorrect. As the government notes, "[p]etitioner * * * could have left the country * * * at any time and avoided the operation of Section 1231(a)(5)." Resp. Br. 36. But rather than leave, petitioner chose to stay and build a life here. By 1989 he had established a continuous presence of seven years in the United States. That affirmative conduct made him eligible for suspension of deportation and thus "independently [gave] rise to reasonable reliance interests and settled expectations."

265–266, are paradigmatically applicable in criminal cases.

Focusing on petitioner's conduct after reentry, the government also asserts that "there is no basis for recognizing claims of reasonable reliance that accrued only by virtue of petitioner's continued ability to avoid detection." Resp. Br. 47. Yet there is a *statutory* basis for recognizing petitioner's expectation that he would be eligible to seek suspension of deportation by virtue of having established a continuous presence of seven years in the United States: Suspension of deportation and its successor, cancellation of removal, are defenses to removal, and thus are available *only* to persons unlawfully present in the United States.[30] Moreover, to be eligible, a person *must* have been continuously present in the United States for a specified period of time. See 8 U.S.C. § 1254(a)(1) (1996); 8 U.S.C. § 1229b(b). Thus, far from defeating his settled expectation, it is precisely petitioner's continued unlawful presence that gives rise to his legitimate expectation that he would be eligible for suspension of deportation.[31]

Thus, petitioner had a legitimate expectation that he would be entitled to seek discretionary relief, and an interpretation of INA § 241(a)(5) that would defeat that expectation would be impermissibly retroactive.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[30] The government asserts that petitioner "cannot now make a claim of reasonable reliance premised on the previous availability of suspension of deportation" because "he elected not to seek" such relief. Resp. Br. 49 n.20. But suspension of deportation is a *defense* to deportation, and thus could not be sought by petitioner unless and until he was placed in deportation proceedings. Denial of a previously available defense is impermissibly retroactive. See Pet. Br. 43 (citing cases).

[31] Statutes of limitations, the doctrine of laches, and the principle of adverse possession demonstrate that the law routinely recognizes that even wrongdoers can acquire legitimate expectations over time.

Respectfully submitted.

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In The
Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAW FOUNDATION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, IMMIGRANTS' RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION, MIDWEST IMMIGRANT AND HUMAN RIGHTS CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND THE TEXAS LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae proffer this brief to assist the Court in its consideration of the retroactive application of §241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. §1231(a)(5), as enacted by §305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), against noncitizens who were previously deported and who entered the country illegally before the provision took effect. *Amici* are associations of immigration lawyers and immigrants' rights advocates whose membership regularly advise, represent, and/or support noncitizens appearing before immigration agencies within the Department of Homeland Security, the Executive Office for Immigration Review, and the federal courts. Through their experience, *amici* have distinct insight into how the government's retroactive application of §1231(a)(5) is causing long-term United States residents sudden and permanent separation from family members by eliminating their pre-existing right to apply for immigration relief to legalize their immigration status and to defend against deportation.[2]

Amici appear in this proceeding because resolution of the question presented will impact the uniform application of immigration law and the rights of immigrants within this country.

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[1] This *amici curiae* brief is filed with the written consent of both parties. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission.

[2] The separate statements of interest of each of the *amici* immigration organizations are included in the Appendix.

BACKGROUND

Statutory Background

Unlike people who are subject to reinstatement under §1231(a)(5), persons subject to the predecessor reinstatement provision, 8 U.S.C. §1252(f) (repealed 1996), were not barred from applying for relief from deportation. The statute provided:

> Unlawful Entry. Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

Former §1252(f) was more limited than the current provision in that it permitted reinstatement of a prior, executed deportation order only if the individual reentered illegally after having been previously ordered deported based on specified, limited deportability grounds. These grounds were restricted to deportation based on alien smuggling, certain criminal grounds, failing to register and falsification of documents, and national security grounds. *See* former 8 U.S.C. §1152(e) (repealed 1996) referencing grounds of deportability in former 8 U.S.C. §1251(a)(1)(E), (a)(2), (a)(3), and (a)(4) (repealed 1996). Former §1252(f) was expansive, however, in that it explicitly applied to illegal reentries

"whether before or after the date of enactment of this Act."[3] Most importantly, even if §1252(f) applied, individuals were eligible to apply for relief from deportation.

On September 30, 1996, Congress enacted IIRIRA. Section 305(a)(3) of IIRIRA redesignated former 8 U.S.C. §1252(f) as §1231(a)(5) and amended it to read as follows:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Section 1231(a)(5) took effect on April 1, 1997. IIRIRA §309(a). The current provision substantively differs from former §1252(f) in three significant ways. First, it does not restrict reinstatement to prior orders that were based on a criminal or national security-related ground of deportability. Thus, under §1231(a)(5), prior orders based on relatively minor immigration violations (*e.g.*, remaining beyond an authorized period of stay, violating the terms of a nonimmigrant visa) may be reinstated. Second, unlike former §1252(f), current §1231(a)(5) does not contain language retroactively applying it to reentries before enactment. Indeed, Congress considered – and rejected – an earlier draft containing such language, which would have applied the provision to reentries before or after §1231(a)(5)'s enactment. *See* H.R. Rep. No. 104-469(I) at 416-17 (Mar. 4, 1996) (containing no retroactive language);

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[3] Former §1252(f) was enacted as part of the McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 208 on June 27, 1952.

S. Rep. No. 104-249 at 118 (Apr. 10, 1996) ("whether before or after the date of enactment of this Act"); H.R. Rep. No. 104-828 at 54 (Sept. 24, 1996) (agreeing to recommend the House version of the provision without expressly retroactive language).[4]

Third, §1231(a)(5) triggers two distinct bars that were not present in the prior statute. The provision purports to bar reopening or review of the prior order. Additionally, an individual subject to §1231(a)(5) "is not eligible and may not apply for any relief" under the INA. This latter bar is most relevant to the instant case. Prior to the effective date of IIRIRA, persons subject to reinstatement under former §1252(f) were still eligible to apply for relief from deportation. Under new §1231(a)(5), relief is explicitly precluded.[5]

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[4] The version the Senate considered, and Congress ultimately rejected, provided:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, *whether before or after the date of enactment of this Act*, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

S. Rep. No. 104-249 at 118 (Apr. 10, 1996) (emphasis added).

[5] The current regulations implementing §1231(a)(5) state that a person has "no right to a hearing before an immigration judge." 8 C.F.R. §241.8(a). This change is regulatory in nature, not statutory. Thus, it is not relevant to the retroactivity analysis and is not at issue here.

Relief from Removal

Congress created several types of immigration benefits for which persons who unlawfully reentered the country after deportation may qualify. But for the government's retroactive application of §1231(a)(5)'s bar to relief, this class of people would be eligible to apply for one or more of the following:

Asylum: Persons who fled their countries to escape death, torture, and/or other forms of persecution may be granted asylee status by either the Asylum Office, if the application is filed affirmatively, or an immigration judge, if the application is filed as a defense in removal proceedings. 8 U.S.C. §1158. Unlawful entry, after removal or otherwise, does not preclude asylum eligibility. 8 U.S.C. §1158(b)(2). Asylees may apply to adjust their status to lawful permanent residence one year after their asylum application is approved. 8 U.S.C. §1159(a). An asylee who is inadmissible due to an unlawful entry or reentry after deportation may request a waiver of these grounds of inadmissibility. 8 U.S.C. §1159(c) (waiving 8 U.S.C. §§1182(a)(6)(A)&(a)(9)).

Adjustment of Status: Certain family members and employers may sponsor noncitizens for lawful permanent residence based upon qualifying family and employment relationships, respectively. 8 U.S.C. §§1151, 1153. Congress created a specific provision that affords people who unlawfully entered the country the ability to adjust status if a visa petition was filed on their behalf by April 30, 2001, a visa number is available, and they pay a $1,000 penalty fee. 8 U.S.C. §1255(i). *See also* 8 C.F.R. §1245.2(a)(1) & (a)(5)(ii) (permitting affirmative and defensive adjustment applications, including renewal before an immigration judge of a denied affirmative application). Through §1255(i), Congress recognized that people who entered without inspection had

been living in and would continue to live in the country while they waited for a visa number to become available.[6] Rather than forcing these individuals to leave the country, Congress created a process through which they could become lawful permanent residents from within the United States notwithstanding their unlawful entry.

VAWA Adjustment: Under the Violence Against Women Act of 2000 (VAWA), Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000), victims of domestic violence perpetrated by an abusive U.S. citizen or permanent resident spouse or parent may petition the immigration service for an immigrant visa. Based on an approved petition, they may also apply for adjustment of status, notwithstanding an unlawful entry. 8 U.S.C. §1255(a) (referencing self-petitions filed by victims of domestic violence under 8 U.S.C. §1154(a)(1)).

Nonimmigrant Visa Status for Delayed Adjustment Applicants: Congress created a special nonimmigrant visa status for spouses and minor children of lawful permanent residents who are beneficiaries of a visa petition filed by December 21, 2000 and who will be eligible to file their adjustment applications when a visa number becomes available. 8 U.S.C. §1101(a)(15)(V). Congress specifically provided for the eligibility of persons who unlawfully entered the country. 8 U.S.C. §1184(q).

Suspension of Deportation/Cancellation of Removal: Prior to IIRIRA, persons who unlawfully entered the country could qualify for suspension of deportation and

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[6] When a visa number will be available depends on nationality and family or employment category. At present, the waiting time ranges from five to twenty-two years. http://travel.state.gov/visa/frvi/bulletin/bulletin_2757.html (monthly listing of priority dates for family-based immigration).

adjustment of status to lawful permanent residence if they: demonstrated the requisite continuous physical presence, possessed good moral character, were not subject to certain criminal and national security-related deportation grounds, and demonstrated that deportation would cause certain hardship to themselves or a qualifying citizen and/or permanent resident relative. 8 U.S.C. §1254(a) (repealed 1996). IIRIRA eliminated suspension of deportation for most persons and replaced it with cancellation of removal. IIRIRA §§304(a), 308(b)(7). Presently, people in removal proceedings may apply for cancellation of removal and adjustment of status to lawful permanent residence if they: demonstrate the requisite continuous physical presence, possess good moral character, have not been convicted of certain crimes, and demonstrate removal would cause certain hardship to a qualifying citizen and/or permanent resident relative. 8 U.S.C. §1229b(b)(1).

VAWA Cancellation: Under VAWA, *supra*, victims of domestic violence perpetrated by an abusive U.S. citizen or lawful permanent resident spouse or parent may apply for cancellation of removal based on less stringent continuous physical presence and hardship standards. 8 U.S.C. §1229b(b)(2).

Family Unity Benefits: Pursuant to the family unity programs of the Immigration Act of 1990, Pub. L. No. 01-649, §301, 104 Stat. 4978 (Nov. 29, 1990), with few exceptions, people who entered illegally before May 5, 1988 and who are beneficiaries of certain family-based visa petitions may apply for renewable two-year periods of voluntary departure (allowing them to remain in the country), while they wait for a visa number to become available. Periods of voluntary departure may be renewed until a visa number is immediately available, at which time the person may

apply for adjustment of status under 8 U.S.C. §1255(i). 8 C.F.R. §236.15(e).

Voluntary Departure: Prior to IIRIRA, with limited exceptions, people who entered without inspection could avoid a final immigration order by applying for voluntary departure, even when they were "under deportation proceedings." 8 U.S.C. §1254(e) (eliminated by IIRIRA §304(b)(7) and redesignated by §304(b) (deportation proceedings)). Individuals ordered deported before IIRIRA were subject to a five-year bar from returning to the United States. 8 U.S.C. §1182(a)(6)(B) (repealed 1996). However, individuals granted voluntary departure were not subject to this bar and, therefore, could return to the United States at any time if otherwise eligible to enter as an immigrant or nonimmigrant. Such relief remains available "in lieu of removal" in the post-IIRIRA era, also with limited exceptions. 8 U.S.C. §1229c.

Other Relief: People subject to §1231(a)(5) may also be eligible to apply for: (1) a nonimmigrant visa under 8 U.S.C. §1101(a)(15)(U) (available to victims of certain crimes, including rape, trafficking and torture, who cooperate with law enforcement officials); (2) temporary protected status under 8 U.S.C. §1254a(c)(2)(A) (temporary, humanitarian-based status available to nationals of designated countries); and (3) registry benefits under 8 U.S.C. §1259 (legalization for persons who have lived in the country continuously since January 1, 1972).

Significantly, many of the above-mentioned forms of relief lead to lawful permanent resident status.

SUMMARY OF ARGUMENT

Amici submit that §1231(a)(5), as enacted by IIRIRA §305(a)(3), cannot be applied retroactively to individuals

who were deported and reentered the country before April 1, 1997, the date the provision took effect. Accordingly, the lower court's decision should be reversed.

Congress' intent to apply §1231(a)(5) prospectively is ascertainable through application of standard statutory construction principles, even without explicit statutory language regarding the temporal scope of the provision. The court below considered the relevant statutory construction principles but erred by demanding proof that Congress *unambiguously* intended the statute to apply prospectively, an equally exacting showing as is required for retroactive application. Contrary to the lower court's conclusion, proof of intended prospective application does not require the "high level of clarity" that is required to prove intended retroactive application, *i.e.*, clarity that can sustain "only one interpretation." *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (citation omitted). Accordingly, this Court should find that the court below applied the wrong standard and instead should employ statutory construction principles to see whether Congressional intent can reasonably – but not unambiguously – be discerned. (*See* Point IA).

Congress intended to apply §1231(a)(5) prospectively. In enacting the provision, Congress modified the predecessor reinstatement statute by deleting expressly retroactive language. Moreover, Congress specifically considered and rejected retroactivity language which would have expressly applied the statute to illegal reentries before the date of enactment. Congress knew it had to be explicit if it wanted §1231(a)(5) to apply to pre-enactment reentries and it also knew that the law favors prospective application of new statutes. Thus, Congress' considered omission of expressly retroactive language, along with its knowledge of how such omission would be construed, demonstrates that it clearly

intended §1231(a)(5) to apply prospectively only.[7] (*See* Point IB).

If the Court disagrees and finds that Congressional intent was unclear, it must then consider whether applying §1231(a)(5) to persons who illegally reentered the country prior to April 1, 1997 would have an impermissible retroactive effect. As in *Landgraf v. USI Film Products*, 511 U.S. 244, 286 (1994) (where the defendant sexually harassed an employee) and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (where Hughes Aircraft lied to the government), the central concern in this case is the attachment of new legal consequences to past conduct notwithstanding the fact that the conduct was unlawful at the time it occurred. (*See* Point IIA). Reliance on pre-IIRIRA law is but one way to demonstrate retroactive effect. In addition, the imposition of new and increased penalties on a pre-IIRIRA reentry demonstrates retroactive effect because it triggers fairness concerns and upsets reasonable expectations. (*See* Point IIB).

Applying §1231(a)(5)'s bar to relief to persons who already had reentered the country before the change in law has impermissible retroactive effect because it would convert a possibility of deportation into a certainty. As the Second Third, and Eighth Circuits correctly have held, this loss of the opportunity to apply for relief attaches a

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[7] The Courts of Appeals for the Sixth and Ninth Circuits have so held. *Bejjani v. INS*, 271 F.3d 670, 687 (6th Cir. 2001); *Castro-Cortez et al. v. INS*, 239 F.3d 1037, 1053 (9th Cir. 2001). *But see Arevalo v. Ashcroft*, 344 F.3d 1, 13 (1st Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 804 (7th Cir. 2005); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 865 (8th Cir. 2002); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1283 (11th Cir. 2004).

new legal consequence and creates a new disability both when the individual loses the ability to have his or her relief application adjudicated affirmatively, before the immigration service, or defensively, before an immigration judge. (*See* Point IIC).

Retroactive application of §1231(a)(5) would upset reasonable pre-IIRIRA expectations of being able to apply for relief affirmatively, including, for example, asylum and adjustment of status based on a qualifying family or employment relationship. It also would deprive long-time U.S. residents of their pre-existing right to defend against deportation by asking an immigration judge to forgive their illegal reentry if they qualified for relief based on their ties to this country (*e.g.*, suspension of deportation, adjustment of status). Moreover, applying §1231(a)(5)'s bar to relief retroactively would take away a person's pre-existing right to request voluntary departure (in lieu of a deportation order) and thereby possibly avoid the five-year bar to returning to the United States based on subsequent eligibility for an immigrant or nonimmigrant visa. Thus, contrary to the lower court's conclusion, the government's application of §1231(a)(5) to pre-IIRIRA reentrants is impermissibly retroactive. (*See* Point IIC).

ARGUMENT

I. APPLICATION OF TRADITIONAL STATUTORY CONSTRUCTION RULES EVIDENCES CONGRESS' INTENT TO APPLY §1231(a)(5) PROSPECTIVELY.

A strong presumption against retroactivity "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Determining whether a

statute may be applied retroactively requires a two-step inquiry. First, courts, employing traditional tools of statutory construction, look to whether Congress provided for the statute's temporal reach, either explicitly or implicitly. *Id.* at 266; *Lindh v. Murphy*, 521 U.S. 320, 324 (1997). If Congress' intent can be ascertained, the inquiry ends. *Lindh*, 521 U.S. at 336. If, and only if, a court determines Congress' intent cannot be ascertained should it proceed to the second step of the inquiry, which asks whether application of the new law to past events would have retroactive effect. *Martin v. Hadix*, 527 U.S. 343, 357 (1999); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997). If the court finds retroactive effect, in keeping with the "traditional presumption" against retroactivity, it must conclude the statute applies prospectively only. *St. Cyr*, 533 U.S. at 325.

A. Congress' Intent to Apply §1231(a)(5) Prospectively Need Not Be Expressed Unambiguously.

A court construing the temporal reach of a statute may reach one of the following three possible conclusions: (1) Congress intended the statute to apply prospectively; (2) Congress unambiguously intended the statute to apply retroactively; or (3) Congress' intent cannot be ascertained. *Lindh* is illustrative of the first category. At issue in *Lindh* was whether the amendments made to Chapter 153 of the federal habeas statute, 28 U.S.C. §2241 *et seq.*, governing standards affecting entitlement to habeas relief, applied to cases pending on the date of enactment. The statute did not include an express statement of prospectivity. Nonetheless, two statutory construction rules were paramount to the Court's conclusion that Congress intended the new rules to apply prospectively only to cases filed after enactment: the

negative implication rule and the rule that Congress is deemed to write legislation knowing how courts have interpreted prior statutes. *Lindh*, 521 U.S. at 327-31.[8]

In the second category of cases, Congress' intention to apply the statute retroactively must be clear and unambiguous. "The standard for finding such unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316. A party must prove that "the statutory language was so clear that it could sustain only one interpretation." *Id.* at 317, *citing Lindh*, 521 U.S. at 328 n.4. This demanding standard is designed to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. This contrasts with the first category, where such a high standard is not required to demonstrate Congress' intent that the statute be applied prospectively only. *Lindh*, 521 U.S. 326 ("*Landgraf* thus referred to 'express commands,' 'unambiguous directives,' and the like where it sought to reaffirm that clear-statement rule [requiring retroactive application], *but only there*.") (emphasis added, citations omitted).[9]

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[8] As to the latter, the Court stated:

> Since *Landgraf* was the Court's latest word on the subject when the Act was passed, Congress could have taken the opinion's cautious statement about procedural statutes [as generally applying to pending cases] and its silence about the kind of provision exemplified by the new §2254(d) *as counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending*.

Lindh, 521 U.S. at 328 (emphasis added).

[9] Only if the case falls in the final category, where Congress' intent cannot be discerned, should a court proceed to the second step of the analysis. *See, e.g., Martin*, 527 U.S. at 353-54; *St. Cyr*, 533 U.S. at 320; *Hughes*, 520 U.S. at 946.

Thus, proof of intended prospective application does not require the "high level of clarity" that is required to prove intended retroactive application, *i.e.*, clarity that can sustain "only one interpretation." *St. Cyr*, 533 U.S. at 317 (citation omitted). Because the government asserted that §1231(a)(5) applies retroactively, only it was required to prove that Congress expressly and unambiguously intended this result. Nevertheless, the lower court erroneously required Petitioner Fernandez-Vargas to prove a "high level of clarity" for *prospective* application, *i.e.*, that Congress "unambiguously intended" that §1231(a)(5) apply prospectively. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 890 (10th Cir. 2005) ("Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore unambiguously intended for the statute *not* to apply to these aliens.") (emphasis in the original).[10]

In invoking this incorrect standard, the court below improperly relied on *St. Cyr.* In *St. Cyr*, the government asserted §304(b) of IIRIRA[11] – the same statute at issue here – applied retroactively to pre-enactment events. The Court in *St. Cyr* found that the government did not come close to meeting the "demanding" "one interpretation" standard of showing that retroactive application was Congress' only possible intention. *St. Cyr*, 533 U.S. 317-20. In addition to rejecting the government's "unambiguously

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[10] Other courts have made this same mistake. *See, e.g.*, *Arevalo*, 344 F.3d at 11; *Velasquez-Gabriel*, 263 F.3d at 108; *Alvarez-Portillo*, 280 F.3d at 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Faiz-Mohammad*, 395 F.3d at 804; *Sarmiento-Cisneros*, 381 F.3d at 1283; *Avila-Macias v. Ashcroft*, 328 F.3d 108, 113 (3d Cir. 2003).

[11] IIRIRA §304(b) repealed relief under former INA §212(c), 8 U.S.C. §1182(c) (repealed 1996).

retroactive" arguments,[12] the Court's conclusion was supported by "the presumption against retroactive application of ambiguous statutory provisions" and the rule of lenity. *Id.* at 320.

The *only* argument before the *St. Cyr* Court regarding Congressional intent, and the only argument the Court addressed, was the government's assertion that Congress unambiguously intended the statute to apply retroactively. *St. Cyr*, 533 U.S. at 318-20. Conversely, here, Petitioner and *amici* contend that Congress intended the statute to apply prospectively only. Thus, contrary to the lower court's conclusion, the unambiguous intent standard discussed and applied in *St. Cyr* is not applicable here. Rather, Petitioner Fernandez-Vargas only needs to show that §1231(a)(5) is susceptible to prospective application. *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible *of any other*.") (emphasis added).

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[12] The government argued that Congress' intent to apply the statute retroactively was supported by: (1) the "comprehensive nature" of IIRIRA's immigration reform; (2) IIRIRA §304(b)'s effective date; and (3) IIRIRA's "savings" provision. *St. Cyr*, 533 U.S. at 317-20. The Court rejected the significance of these three factors, finding IIRIRA's comprehensiveness said "nothing about Congress' intentions," a provision's effective date is distinct from its applicability date, and the negative implication rule undermined any indication of Congressional intent that could be gleaned from IIRIRA's saving provision. *St. Cyr*, 533 U.S. at 317-18. In proving prospective intent, Petitioner Fernandez-Vargas does not rely on any of the statutory construction rules relied on by the government in *St. Cyr*. The only applicable rule employed by the Court in *St. Cyr* is the rule of lenity, which would apply in his favor. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 384 n.8 (2004).

B. Correct Application of Statutory Construction Analysis Reveals Congress' Intention to Apply §1231(a)(5) Prospectively Only to Reentries After April 1, 1997.

Amici acknowledge the absence of express statutory language specifying the temporal reach of §1231(a)(5). Absent such express language, *Lindh* directs courts to employ customary rules of statutory construction and examine the text, structure and history of the legislation to determine whether Congress expressed its opinion as to the temporal reach of the statute. *Lindh,* 521 U.S. at 336. Application of several statutory construction rules show that Congress intended §1231(a)(5) to have a purely prospective application.

First, in enacting §1231(a)(5), Congress eliminated the language of former §1252(f), which had expressly applied the reinstatement provision to pre-enactment reentries. *Compare* former §1252(f) (applying to reentries "whether before or after the date of enactment of this Act") *with* §1231(a)(5) (eliminating retroactive language and not containing any replacement language). *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 838-39 (1990) (concluding that a comparison of the original and amended version of statute governing awards of post-judgment interest "evidences clear congressional intent that [the statute] is not applicable to judgments entered before its effective date").

If Congress desired the new and more stringent version of the reinstatement provision found at §1231(a)(5) to be applied retroactively to individuals who reentered prior to the effective date, it would have included the express retroactivity language of former §1252(f). Instead,

Congress completely eliminated this language from the new provision. As the Sixth Circuit aptly stated:

> . . . [T]he complete elimination of retroactive language from the reinstatement provision is persuasive evidence that Congress did not intend for the new reinstatement provision to apply to reentries which occurred prior to the statute's effective date. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that is has earlier discarded in favor of other language."

Bejjani, 271 F.3d at 684-85 *citing Cardoza-Fonseca*, 480 U.S. at 442-43 (internal quotation omitted); *Castro-Cortez*, 239 F.3d at 1051 ("Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment").[13]

Second, Congressional intent also may be determined by the legislative history of §1231(a)(5). *Cf. Landgraf*, 511 U.S. at 257-58 (reviewing legislative history to determine if Congress intended a specific temporal reach for new statute); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095

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[13] In *Avila-Macias*, the court found the omission of retroactivity language provided evidence of Congress' intent to apply §1231(a)(5) prospectively but erroneously required an "express mandate" reflecting such intent. 328 F.3d at 114. The petitioner in that case, however, reentered *after* §1231(a)(5)'s effective date. On this basis, the court limited its conclusion as to Congressional intent, stating "[i]t is not necessarily the case that Congress would intend that aliens who illegally reentered the country prior to the effective date of the statute be treated the same as those who reentered afterwards." *Id.* at 113 n.5. Despite this statement, the court later concluded that it had "already decided" the issue. *See Dinnall v. Gonzales*, 421 F.3d 247, 255 (3d Cir. 2005).

(10th Cir. 2005) (same); *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir. 1999) (same). Not only did Congress eliminate the retroactive language in former §1252(f), but it also considered and rejected new retroactivity language which would have expressly applied §1231(a)(5) to illegal reentries that occurred before the date of enactment. *Compare* H.R. Rep. No. 104-469(I) at 416-17 (Mar. 4, 1996) (containing no retroactivity language) and S. Rep. No. 104-249 at 118 (Apr. 10, 1996) (containing retroactive language) *with* H.R. Rep. No. 104-828 at 54 (Sept. 24, 1996) (resolving dispute in favor of omitting express retroactivity language) and §1231(a)(5) (no express retroactivity language). *Bejjani*, 271 F.3d at 686 ("the simple comparison between the prior version, (as well as the rejected version), and the current version is striking, and clearly conveys the intent of Congress").[14]

Post-*Landgraf*, Congress knew that it had to be "explicit if it wanted [a new] provision to be applied to cases already pending." *Lindh*, 521 U.S. at 328. In numerous provisions in IIRIRA, Congress demonstrated that it knew how to make provisions apply retroactively.[15] In addition, as Congress is presumed to be aware of the presumption against retroactive legislation, it must explicitly provide for such when it wants a statute applied to past conduct. *Lindh*, 521 U.S. at 328. *See also Castro-Cortez*, 239 F.2d at 1052 ("[C]ongressional silence is instructive"). *Accord Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004) ("[W]here Congress has apparently given no thought to the question of retroactivity whatsoever, there is no basis for

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[14] Although the Fourth Circuit held that Congress' intent as to §1231(a)(5)'s temporal reach was unclear, it did so *without* comparing the text of §1231(a)(5) with former §1252(f). *Velasquez-Gabriel*, 263 F.3d at 106-07.

[15] *See, e.g.*, IIRIRA §§212(e); 322(c); 342(b); 347(c); 351(c).

inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation").

In sum, Congress' conscious decision to omit the expressly retroactive language in former §1252(f) combined with both its knowledge of how to enact retroactive language and its knowledge of how silent legislation must be construed, evidences its clear intent to apply §1231(a)(5) to post-IIRIRA reentries only.

II. APPLICATION OF §1231(a)(5) TO PRE-IIRIRA REENTRIES HAS IMPERMISSIBLE RETROACTIVE EFFECT.

Assuming the Court concludes that the temporal reach of the statute cannot be discerned using the ordinary rules of statutory construction, it must then proceed to the second step of the *Landgraf* analysis to determine whether applying §1231(a)(5) to conduct that took place prior to its effective date would have an impermissible retroactive effect. The "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment" is well established. *Landgraf*, 511 U.S. at 273, 278. Accordingly, courts must evaluate the impact of applying a new law retroactively in light of that presumption. A new statute that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past," is impermissibly retroactive. *Landgraf*, 511 U.S. at 269. The determination of whether a new law has an impermissible retroactive effect is a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed

before its enactment.'" *Martin*, 527 U.S. at 327 *citing Landgraf*, 511 U.S. at 270. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321 (internal quotations and citations omitted).

A. The Triggering Conduct for Retroactivity Analysis Is Petitioner's Pre-IIRIRA Reentry.

Illegal reentry following departure under a prior order is the primary conduct at issue here because this act ultimately subjects individuals to §1231(a)(5) and its associated bar to relief. Analyzing the primary conduct of unlawfully reentering (rather than the secondary conduct of affirmatively filing an application for relief) is consistent with the Court's analysis of the petitioner's primary conduct in *Landgraf*, not the secondary proceedings that resulted from that behavior. In *Landgraf*, the Court found that a statute that created a right to recover monetary damages could not be applied retroactively to pre-enactment conduct, stating:

> In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct.

511 U.S. at 282. *Id.* at 294 (Scalia, J., concurring) (" . . . the occurrence of the primary conduct is the relevant event").

The fact that the reentry is unlawful has no bearing on the analysis. Courts routinely analyze whether a statute has retroactive effect when applied to an already illegal act. *See, e.g.*, *Landgraf*, 511 U.S. at 264 n.35 ("Even when the conduct in question is morally reprehensible or

illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past."); *Hughes*, 520 U.S. at 951-52 (addressing whether the elimination of a defense to fraud on the government attaches new disability); *Rivers v. Roadway Express*, 511 U.S. 298, 301 (1994) (addressing whether the perpetrator of racial harassment would face new damage remedies); *Mathews v. Kidder, Peabody, & Co.*, 161 F.3d 156, 164 (3d Cir. 1998) ("In this case, the events in question are the alleged fraudulent acts by the defendants"). *See also* Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 Fordham Urb.L.J. 1743, 1752 (2003) (discussing Supreme Court retroactivity cases where "the issue presented to the Court was whether Congress could be allowed to impose new consequences on past wrongful conduct").

B. Reliance on the Availability of Relief from Removal Is Not Required for the Court to Find That §1231(a)(5) Has Impermissible Retroactive Effect.

No single formula dictates how to evaluate retroactive effect. *St. Cyr*, 533 U.S. at 321 n.46. The consideration mandated by *Landgraf* and its progeny is not limited to an analysis of any actual or theoretical *quid pro quo* arrangement. This Court has implicitly held, and lower federal courts have expressly held, that reliance, or any evidence thereof, is not required to find that a statute has an impermissible retroactive effect. *Landgraf*, 511 U.S. at 280 (*no* requirement that the defendant had to show that Williams' "conduct would have been different" had he known that his employer might incur monetary damages as a result of his actions); *Hughes*, 520 U.S. at

948 (*no* requirement that Hughes Aircraft relied on existing law when making false representations to the U.S. government); *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004) ("The Supreme Court has never required actual reliance or evidence thereof in the *Landgraf* line of cases, and has in fact assiduously eschewed an actual reliance requirement"); *Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004) ("[W]e believe that reliance, in any form, is irrelevant to the retroactivity inquiry").

In *St. Cyr*, the Court ultimately determined that the retroactive application of IIRIRA's repeal of §212(c) relief[16] had an "obvious and severe" (and hence impermissible) effect because noncitizens who pleaded guilty to criminal offenses prior to the change in law may have given up their right to a jury trial under the assumption that they were eligible for relief from deportation. *St. Cyr*, 533 U.S. at 321-22, 324. In reaching this conclusion, the Court did not require proof of actual reliance on the availability of §212(c) relief. In fact, the Court affirmed the Second Circuit's decision in *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir. 2000), which itself did not require proof of reliance. Thus, while a possibility of reliance may sometimes inform the analysis, actual reliance is not required to create retroactive effect.

Rather, as courts have found, reliance should be regarded as but one way of demonstrating the existence of an impermissible retroactive effect – it is a "sufficient" rather than a "necessary" component of the retroactivity analysis. *Ponnapula*, 373 F.3d at 490 *citing Hughes*, 520 U.S. at 947. *See also Leitao v. Reno*, 311 F.3d 453, 455 (1st Cir. 2002) (finding reliance on availability of §212(c) relief not required under *St. Cyr*); Morawetz, *supra*, at 1747-48

[16] 8 U.S.C. §1182(c) (repealed 1996).

and 1758 ("[t]he Supreme Court [in *St. Cyr*] did not explicitly address the issue whether [individuals with pre-IIRIRA guilty pleas were] the only set of persons who would suffer an improper retroactive effect as a result of application of the new mandatory deportation rules").

The *Landgraf* analysis does not merely protect past transactions (like the plea bargain in *St. Cyr*), but also limits the imposition of new or increased penalties on past conduct because these penalties similarly trigger fairness concerns and upset reasonable expectations. Here, such fairness concerns include "the unfairness of lawmaking that changes the consequences of past acts by persons or corporations that are unpopular or are seen as having acted wrongfully." Morawetz, *supra*, at 1751. In addition, the retroactive application of §1231(a)(5) would upset reasonable expectations of being able to apply for immigration relief.

C. Retroactive Application of §1231(a)(5) Attaches New, and Impermissible, Consequences to Pre-IIRIRA Reentrants Who Were Eligible for Relief.

A successful showing that retroactive application impacts substantive rights is sufficient to apply the presumption against retroactivity. *Hughes*, 520 U.S. at 951.[17] Importantly, the "elimination of any possibility of [immigration] relief" has already been held to attach "a new disability, in respect to transactions or considerations

[17] *See also Republic of Austria v. Altman*, 541 U.S. 677, 694 (2004) ("Under *Landgraf*, . . . , it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)").

already past." *St. Cyr*, 533 U.S. at 321 (citations and internal quotation marks omitted) (repeal of relief under former INA §212(c) has retroactive effect). *St. Cyr* leaves no room to dispute that "availability of relief (or, at least, the opportunity to seek it) is properly classified as a substantive right," and that the opportunity to apply for such relief need not be "vested" for its elimination to have impermissible retroactive effect. *Arevalo*, 344 F.3d at 33, 34-35 (citations omitted). Furthermore, the discretionary nature of any such relief does not affect the analysis. *St. Cyr*, 533 U.S. at 325 (explaining "there is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation").

Section 1231(a)(5) has retroactive effect because it "attaches a new disability" and "new legal consequences" to illegal reentries by eliminating the opportunity to apply for relief. This is true for both affirmative relief applications (filed with the immigration service) and defensive relief applications (filed with an immigration judge). Individuals who reentered the country before §1231(a)(5)'s bar to relief took effect could reasonably expect to file affirmative relief applications if or when eligible to do so. They also could choose to wait and if placed in deportation (now removal) proceedings, they could apply for defensive relief from removal, *e.g.*, family or employment-based adjustment of status, suspension of deportation (now cancellation of removal), and voluntary departure. *See Dinnall*, 421 F.3d at 262 ("It is not unreasonable to assume that many of these aliens may well have reentered the country with the understanding that they might be eligible for some form of discretionary relief").

In *Alvarez-Portillo v. Ashcroft*, the Eighth Circuit acknowledged the settled expectations of a person subject

to §1231(a)(5) who, prior to the change in law, was eligible for adjustment of status and thus had the choice of either filing for adjustment affirmatively or waiting and pursuing adjustment as a defense to a later deportation proceeding. *Alvarez-Portillo*, 280 F.3d at 867. Because Alvarez-Portillo chose to wait, and consequently application of §1231(a)(5) "deprived him of [the] defense [of adjustment of status]," the court found that the statute would have an impermissible retroactive effect. *Id. See also Lopez-Flores v. DHS*, 376 F.3d 793, 796 (8th Cir. 2004) (finding that the lack of immediate eligibility for relief from removal before April 1, 1997, "has no bearing on the reasonableness of Lopez-Flores's expectation" that such relief would be available to defend against deportation if deportation proceedings were instituted). *Accord Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir. 2004) (holding that the elimination of §212(c) relief to individuals who could have affirmatively applied for it before April 1, 1997, but instead chose to wait until they had a stronger application, was a violation of fundamental fairness).

Similarly, people who unlawfully reentered could reasonably expect, at a minimum, to be eligible to apply for voluntary departure. The only court to consider this issue reasoned:

> Although [Petitioner] has no guarantee of a favorable decision on his voluntary departure application, because §241(a)(5) [§1231(a)(5)] constitutes a "new disability" that did not exist prior to IIRIRA's passage, he nevertheless had a reasonable expectation of an avenue of relief before IIRIRA was enacted that he no longer has.

Dinnall, 421 F.3d at 37-38 *citing St. Cyr*, 533 U.S. at 321.

Here, the lower court acknowledged "that a number of cases have held that barring an application for adjustment

under INA §241(a)(5) [8 U.S.C. §1231(a)(5)] is an impermissible retroactive effect where the adjustment application was filed before the effective date of IIRIRA." *Fernandez-Vargas*, 394 F.3d at 890.[18] Relying on these cases, and without analyzing Petitioner Fernandez-Vargas's eligibility for defensive relief, the lower court concluded that Petitioner's failure to marry and actually file a relief application before the effective date of §1231(a)(5) was fatal to his retroactivity claim.

In so holding, the court cited with approval to *Lattab v. Ashcroft*, in which the First Circuit similarly held that §1231(a)(5) does not have impermissible effect when applied to a petitioner who did not marry and apply for adjustment of status until after April 1, 1997. 384 F.3d 8, 16 (1st Cir. 2004). Unlike here, however, the petitioner in *Lattab* was not immediately eligible to adjust status or defend against deportation before the change in law.[19] Thus, the court reasoned he had no "settled expectation that retroactivity analysis seeks to protect." *Lattab*, 384 F.3d at 16.

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[18] These cases include: *Arevalo*, 344 F.3d at 6 (pre-IIRIRA adjustment application based on visa petition filed by petitioner's lawful permanent resident father); *Faiz-Mohammad*, 395 F.3d at 800 (pre-IIRIRA adjustment application based on visa petition filed by petitioner's U.S. citizen spouse); *Sarmiento-Cisneros*, 381 F.3d at 1279 (same).

[19] As Petitioner Lattab did not marry a U.S. citizen until 1999, he was not *prima facie* eligible for adjustment of status before April 1, 1997. In addition, although not addressed by the court, Lattab was one of a relatively small number of people who were not eligible for voluntary departure prior to April 1, 1997. Because he was previously granted voluntary departure in March 1996 and failed to timely depart the United States prior to the expiration of the voluntary departure period (June 27, 1996), 384 F.3d at 13, Lattab was statutorily ineligible for five years from receiving a second grant of voluntary departure. *See* 8 U.S.C. §1252b(e)(2)(A) referencing 8 U.S.C. §1252b(5) (repealed 1996).

Here, the court below considered only whether, before the change in law, Petitioner Fernandez-Vargas was immediately eligible for adjustment of status. *Fernandez-Vargas*, 394 F.3d at 890-91. Because his marriage to a U.S. citizen took place after the change in law, the court concluded that he had no "protectable expectation" of affirmative or defensive relief. *Id.*

Section 1231(a)(5)'s bar to relief has impermissible retroactive effect as applied to pre-April 1, 1997 reentrants as they could reasonably expect to be eligible for future relief: at a minimum, voluntary departure. Thus, there is no need for courts to consider whether a person has demonstrated actual pre-IIRIRA eligibility for affirmative or defensive relief. Because Petitioner Fernandez-Vargas was *prima facie* eligible for relief, §1231(a)(5) has impermissible retroactive effect as applied to him.[20]

Had the court below analyzed whether §1231(a)(5) has retroactive effect when applied to an individual who was eligible to apply for either affirmative or defensive relief before April 1, 1997, it may have reached the same result reached by the First Circuit in *Arevalo*, the Third Circuit in *Dinnall*, the Seventh Circuit in *Faiz-Mohammad*, the Eighth Circuit in *Alvarez-Portillo* and *Lopez-Flores*, and the Eleventh Circuit in *Sarmiento-Cisneros*, *i.e.*, that §1231(a)(5) has impermissible retroactive effect. *See Fernandez-Vargas*, 394

[20] Petitioner Fernandez-Vargas was *prima facie* eligible for voluntary departure, 8 U.S.C. §1254(e) (repealed 1996), and suspension of deportation, 8 U.S.C. §1254(a) (repealed 1996), prior to the change in law. However, the Court could decline to resolve whether §1231(a)(5) has impermissible retroactive effect when applied to someone who asserts pre-IIRIRA eligibility for relief because the lower court did not make findings on this issue. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.8 (2004) (declining to resolve identity of custodian to an immigration habeas because the issue was not squarely before the Court).

F.3d at 891 n.11 (declining to express an opinion on the Eighth Circuit's rationale in *Alvarez-Portillo* and reiterating its understanding that petitioner was not eligible for relief until after April 1, 1997). *See also Lattab*, 384 F.3d at 17 (stating it was not deciding whether §1231(a)(5) has impermissible retroactive effect when applied to a person "who had a potential defense to deportation before IIRIRA took effect but had not yet applied for relief when IIRIRA eliminated that defense").[21]

For example, voluntary departure is a form of relief that is available to many individuals facing potential removal. Even prior to IIRIRA, individuals who were separated from their U.S. citizen or lawful permanent resident parents, spouses, siblings and/or children often had to wait ten years or more for an immigrant visa number to become available and/or for approval of a waiver of a prior deportation. Upon unlawful reentry, persons could seek voluntary departure if faced with potential deportation. Voluntary departure, if granted, would allow them to return to their country and continue waiting for an immigrant visa number to become available. Importantly, the voluntary departure would not trigger the five year bar to returning to the United States once a visa number became available (the bar only applied to deportation orders). 8 U.S.C. §1182(a)(6)(B) (repealed 1996).

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[21] *But see Velasquez-Gabriel*, 263 F.3d at 109-10 (§1231(a)(5) does not have impermissible retroactive effect when applied to a petitioner who married a U.S. citizen before, but did not apply for adjustment of status until after, April 1, 1997). Petitioner Velasquez-Gabriel did not argue that he may have defended against deportation by applying for adjustment of status or voluntary departure before an immigration judge. In addition, *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002), is inapposite because the petitioner did not assert any pre-IIRIRA eligibility for relief.

As the Second, Third and Eighth Circuits have recognized, whether the individual applied for affirmative relief from removal before the effective date of *IIRIRA* is not determinative of whether §1231(a)(5)'s bar to relief has retroactive effect. *Restrepo*, *Dinnall*, *Alvarez-Portillo*, and *Lopez-Flores*, *supra*. Moreover, in *St. Cyr*, the Court held that IIRIRA §304(b) would have harsh, unwarranted consequences if applied retroactively to individuals who would have been eligible for such relief at the time they pleaded guilty under the law then in effect. 533 U.S. at 326. The Court's holding was not limited to individuals who had already attempted to apply for §212(c) relief in pending deportation proceedings. Rather, *St. Cyr*'s holding extends to individuals placed in removal proceedings after IIRIRA's effective date. 533 U.S. at 326. *St. Cyr* specifically rejected the Attorney General's interpretation of the statute, which conditioned eligibility on whether the §212(c) application was adjudicated before or after the change in the law.[22]

The happenstance that individuals, like Petitioner, were not afforded the opportunity to apply for such relief in deportation proceedings before the law changed to their detriment does not alter the fact that they had a pre-existing right to apply – affirmatively or defensively – for

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[22] In *Matter of Soriano*, the Board of Immigration Appeals (BIA) held that people who had filed their §212(c) applications before the effective date of the changes made by §440(d) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-207, 110 Stat. 3009 (Apr. 24, 1996) were still statutorily eligible for that relief. The Attorney General reversed, holding that AEDPA applied retroactively to bar any §212(c) applications that were pending on April 24, 1996. *Matter of Soriano*, Int. Dec. 3289 (BIA 1996) reversed by 21 I&N Dec. 516 (A.G. 1997). The *St. Cyr* Court declined to adopt either the BIA or the Attorney General's line-drawing. *St. Cyr*, 533 U.S. at 292.

such relief before April 1, 1997 and that amended §1231(a)(5) takes away this right. The relief at issue in *St. Cyr* (§212(c) relief) is predominantly a defensive relief application, yet the procedural posture in which it is sought did not influence the Court's conclusion that losing the ability to seek it has impermissible retroactive effect. This increased penalty demonstrates impermissible retroactive effect to pre-April 1, 1997 reentrants by attaching a new disability to past conduct in a way that offends fair notice and reasonable expectation. *Landgraf*, 511 U.S. at 269-70.

Lastly, IIRIRA's changes to the reinstatement statute may have been intended to deter illegal reentries, but that deterrent effect is not achieved by applying §1231(a)(5)'s bar to relief to pre-IIRIRA reentries. *Landgraf*, 511 U.S. at 264 n.35 ("The new damages provisions of §102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs, but that purpose is not served by applying the regime to pre-enactment conduct.") (emphasis in the original).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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MATT ADAMS, NORTHWEST IMMIGRANTS' RIGHTS PROJECT

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December 2005

APPENDIX 1: ORGANIZATIONAL STATEMENTS OF INTEREST

The **American Immigration Law Foundation** (AILF) is a non-profit organization established in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the practice of immigration law, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and its administration. AILF's Legal Action Center has worked extensively in federal courts on behalf of noncitizens on the issues of reinstatement of removal and retroactivity of immigration laws.

The **American Immigration Lawyers Association** (AILA) is a national non-profit association of practicing immigration and nationality lawyers, law professors, and law students. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 9,500 members organized in 35 chapters across the United States and in Canada. Many of AILA's members' clients will be directly affected by the decision in this case.

The **Capital Area Immigrants' Rights Coalition** (CAIR Coalition) is a membership organization of legal and social service providers serving the immigrant community in the Washington D.C. metropolitan area. CAIR Coalition strengthens and supports the work of its member organizations and serves as the primary source of representation for detained immigrants in the region. CAIR Coalition is committed to a country where immigration laws and policy are fair, humane, just and accord due

process. Many of its members represent people who will be directly affected by the decision in this case.

The **Immigrants' Rights Project of the American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The Immigrants' Rights Project of the ACLU, which litigated *INS v. St. Cyr*, 533 U.S. 289 (2001), engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

The **Midwest Immigrant & Human Rights Center** (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers & Immigrants Aid, has provided assistance to low-income immigrants since 1881. MIHRC has provided legal consultations to immigrants, including asylum seekers, who have had prior orders reinstated against them when seeking legal status, even when their reentry pre-dated April 1, 1997. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in the immigration and federal courts, often in conjunction with local lawyers working pro bono publico. Through direct legal services and advocacy, MIHRC strives to advance local and international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

The **National Immigration Law Center** (NILC) is a nonprofit national legal advocacy center dedicated to protecting and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning issues of immigration law, as well as issues of employment and public benefits law that affect low-income immigrants. NILC also conducts litigation and policy analysis concerning these issues. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement. NILC has a direct interest in the issues in this case.

The **National Immigration Project of the National Lawyers Guild** is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights. The National Immigration Project provides legal training to the bar and the bench on eligibility for relief from removal in immigration proceedings and is the author of four treatises on immigration law published by Thomson-West. The National Immigration Project also has participated as *amicus curiae* in significant immigration-related cases before the Supreme Court, including: *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Jean v. Nelson*, 472 U.S. 846 (1985); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *INS v. Stevic*, 467 U.S. 407 (1984).

The **Northwest Immigrant Rights Project** (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons

who are placed in removal proceedings. NWIRP has provided direct representation on behalf of several individuals before the federal courts challenging the application of the reinstatement of removal provision. NWIRP has a direct interest in the issues in this case.

The **Texas Lawyers' Committee for Civil Rights Under Law** is part of a national network of nonpartisan, non-profit offices founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and preserving civil rights for immigrants and refugees throughout Texas.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FERNANDEZ-VARGAS *v.* GONZALES, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–1376. Argued March 22, 2006—Decided June 22, 2006

Immigration law has for some time provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully reenters. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) to enlarge the class of illegal reentrants whose orders may be reinstated and limit the possible relief from a removal order available to them. See §241(a)(5), 8 U. S. C. §1235(a)(5). Petitioner Fernandez-Vargas, a Mexican citizen, illegally reentered the United States in 1982, after having been deported. He remained undetected for over 20 years, fathering a son in 1989 and marrying the boy's mother, a United States citizen, in 2001. After he filed an application to adjust his status to that of a lawful permanent resident, the Government began proceedings to reinstate his 1981 deportation order under §241(a)(5), and deported him. He petitioned the Tenth Circuit to review the reinstatement order, claiming that, because he illegally reentered the county before IIRIRA's effective date, §241(a)(5) did not bar his application for adjustment of status, and that §241(a)(5) would be impermissibly retroactive if it did bar his adjustment application. The court held that §241(a)(5) barred his application and followed *Landgraf* v. *USI Film Products*, 511 U. S. 244, in determining that the new law had no impermissibly retroactive effect in his case.

Held: Section 241(a)(5) applies to those who reentered the United States before IIRIRA's effective date and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before this Court. Pp. 5–16.

(a) Statutes are disfavored as retroactive when their application

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"would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf, supra,* at 280. A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 3. In determining whether a statute has an impermissibly retroactive effect, the Court first looks to "whether Congress has expressly prescribed the statute's proper reach," *Landgraf, supra,* at 280, and in the absence of express language tries to draw a comparably firm conclusion about the temporal reach specifically intended by applying its "normal rules of construction," *Lindh* v. *Murphy,* 521 U. S. 320, 326. If that effort fails, the Court asks whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf, supra,* at 278. If the answer is yes, the Court then applies the presumption against retroactivity by construing the statute as inapplicable to the event or act in question. *INS* v. *St. Cyr,* 533 U. S. 289, 316. Pp. 5–7.

(b) Common principles of statutory interpretation fail to unsettle §241(a)(5)'s apparent application to any reentrant present in the country, whatever the date of return. The statute does not expressly include in or exclude from §241(a)(5)'s ambit individuals who illegally entered the country before IIRIRA's effective date. Fernandez-Vargas argues that the fact that the old reinstatement provision applied to aliens who had "unlawfully reentered . . . after having previously departed or been deported . . . , whether before or after June 27, 1952 [the INA's effective date], on any ground described in . . . subsection (e)," §242(f), while §241(a)(5) lacks language of temporal reach, shows that Congress no longer meant to cover preenactment reentrants. But the old before-or-after clause, which was sandwiched between references to departure or deportation and grounds for deportation, most naturally referred not to an alien's illegal reentry but to the previous deportation or departure. The better inference is that the clause was removed because, in 1996, application keyed to departures in 1952 or earlier was academic. Applying §241(a)(5) only to deportations or departures after IIRIRA's effective date would exempt anyone who departed before that date but reentered after it. That would be a strange result, since the statute was revised to expand the scope of the reinstatement authority and invest it with something closer to finality. Fernandez-Vargas errs in suggesting that the new law is bereft of clarity and the Court should apply the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. It is not until a statute is shown to

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have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. And IIRIRA has other provisions on temporal reach, which blunt Fernandez-Vargas's argument that a negative inference in his favor may be drawn from removal of the before-or-after clause. Pp. 7–10.

(c) This facial reading is confirmed by two features of IIRIRA. First, the provision's text shows that it applies here not because Fernandez-Vargas reentered at any particular time, but because he chose to remain after the new statute became effective. While the law looks back to "an alien [who] has reentered . . . illegally," 8 U. S. C. §1231(a)(5), the provision does not penalize an alien for the reentry; it establishes a process to remove him under a "prior order any time after the reentry," *ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the law applies to stop an indefinitely continuing violation that the alien could end at any time by voluntarily leaving. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the new law's effective date, that subjects him to the new and less generous regime, not a past act that is he helpless to undo. *INS* v. *St. Cyr*, *supra*, distinguished. Second, IIRIRA's effective date provision shows that Fernandez-Vargas had ample warning of the coming change in the law, but chose to remain until the old regime expired and §241(a)(5) took its place. He had an opportunity to avoid the new law's application by leaving the country and ending his violation during the 6 months between IIRIRA's enactment and effective date. For that matter, he could have married his son's mother and applied for adjustment of status during the period, in which case he would at least have had a claim that proven reliance on the law should be honored by applying the presumption against retroactivity. Instead, he augmented his 15 years of unlawful presence by remaining in the country into the future subject to the new law. And the presumption against retroactivity does not amount to a presumption of legal stasis for the benefit of continuous lawbreakers. Pp. 11–15.

394 F. 3d 881, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 04–1376

HUMBERTO FERNANDEZ-VARGAS, PETITIONER *v.* ALBERTO R. GONZALES, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 22, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

For some time, the law has provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully enters again. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, div. C, 110 Stat. 3009–546, enlarged the class of illegal reentrants whose orders may be reinstated and limited the possible relief from a removal order available to them. See Immigration and Nationality Act (INA), §241(a)(5), 66 Stat. 204, as added by IIRIRA §305(a)(3), 110 Stat. 3009–599, 8 U. S. C. §1231(a)(5). The questions here are whether the new version of the reinstatement provision is correctly read to apply to individuals who reentered the United States before IIRIRA's effective date, and whether such a reading may be rejected as impermissibly retroactive. We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.

I

In 1950, Congress provided that deportation orders issued against some aliens who later reentered the United States illegally could be reinstated.[1] Internal Security Act of 1950, §23(d), 64 Stat. 1012, 8 U. S. C. §156(d) (1946 ed., Supp. V).[2] Only specific illegal reentrants were subject to the provision, those deported as "anarchists" or "subversives," for example, see §23(c), 64 Stat. 1012, while the rest got the benefit of the ordinary deportation rules. Congress retained a reinstatement provision two years later when it revised the immigration laws through the INA, §242(f), 66 Stat. 212, as codified in this subsection:

> "Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952,[3] on any ground described in subsection (e) . . . , the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." 8 U. S. C. §1252(f) (1994 ed.).

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[1] What was formerly known as "deportation" is now called "removal" in IIRIRA. See Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 966 (1998) (IIRIRA "realigned the vocabulary of immigration law, creating a new category of 'removal' proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings"). Our use of each term here will vary according to the scheme under discussion.

[2] This is the full text of the provision: "Should any alien subject to the provisions of subsection (e) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance."

[3] A date was inserted when the provision was codified; as originally enacted, the text read, "whether before or after the date of enactment of this Act." 66 Stat. 212.

Again, only a limited class of illegal reentrants was susceptible, see §242(e), 66 Stat. 211; cf. §241(a), *id.*, at 204, and even those affected could seek some varieties of discretionary relief, see, *e.g.*, 8 U. S. C. §1254(a)(1) (1994 ed.) (suspension of deportation available to aliens who maintained a continuous presence in the United States for seven years and could demonstrate extreme hardship and a good moral character).

In IIRIRA, Congress replaced this reinstatement provision with one that toed a harder line, as the old §242(f) was displaced by the new §241(a)(5):

> "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry." 8 U. S. C. §1231(a)(5) (1994 ed., Supp. III).

The new law became effective on April 1, 1997, "the first day of the first month beginning more than 180 days after" IIRIRA's enactment. §309(a), 110 Stat. 3009–625. Unlike its predecessor, §241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order.[4]

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[4]Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to §241(a)(5) may seek withholding of removal under 8 U. S. C. §1231(b)(3)(A) (2000 ed.) (alien may not be removed to country if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"), or under 8 CFR §§241.8(e) and 208.31 (2006) (raising the possibility of asylum to aliens

II

Humberto Fernandez-Vargas is a citizen of Mexico, who first came to the United States in the 1970s, only to be deported for immigration violations, and to reenter, several times, his last illegal return having been in 1982. Then his luck changed, and for over 20 years he remained undetected in Utah, where he started a trucking business and, in 1989, fathered a son, who is a United States citizen. In 2001, Fernandez-Vargas married the boy's mother, who is also a United States citizen. She soon filed a relative-visa petition on behalf of her husband, see 8 U. S. C. §§1154(a), 1151(b) (2000 ed.); see *Fernandez-Vargas* v. *Ashcroft*, 394 F. 3d 881, 883, n. 4 (CA10 2005), on the basis of which he filed an application to adjust his status to that of lawful permanent resident, see §1255(i). The filings apparently tipped off the authorities to his illegal presence here, and in November 2003, the Government began proceedings under §241(a)(5) that eventuated in reinstating Fernandez-Vargas's 1981 deportation order, but without the possibility of adjusting his status to lawful residence. He was detained for 10 months before being removed to Juarez, Mexico in September 2004.

Fernandez-Vargas petitioned the United States Court of Appeals for the Tenth Circuit to review the reinstatement order. He took the position that because he illegally reentered the country before IIRIRA's effective date, the controlling reinstatement provision was the old §242(f), which meant he was eligible to apply for adjustment of status as spouse of a citizen, and he said that the new §241(a)(5) would be impermissibly retroactive if it barred his application for adjustment. The Court of Appeals held that §241(a)(5) did bar Fernandez-Vargas's application and followed *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), in determining that the new law had no impermissi-

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whose removal order has been reinstated under INA §241(a)(5)).

bly retroactive effect in Fernandez-Vargas's case. 394 F. 3d, at 886, 890–891. We granted certiorari to resolve a split among the Courts of Appeals over the application of §241(a)(5) to an alien who reentered illegally before IIRIRA's effective date,[5] 546 U. S. ___ (2005), and we now affirm.

III

Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf, supra*, at 280. The modern law thus follows Justice Story's definition of a retroactive statute, as "tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past," *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814). Accordingly, it has become "a rule of general application" that "a

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[5]Two Courts of Appeals have held that §241(a)(5) does not apply at all to aliens who reentered before the provision's effective date, see *Bejjani* v. *INS*, 271 F. 3d 670 (CA6 2001); *Castro-Cortez* v. *INS*, 239 F. 3d 1037 (CA9 2001), while eight have held that it does, at least in some circumstances, see *Arevalo* v. *Ashcroft*, 344 F. 3d 1 (CA1 2003); *Avila-Macias* v. *Ashcroft*, 328 F. 3d 108 (CA3 2003); *Velasquez-Gabriel* v. *Crocetti*, 263 F. 3d 102 (CA4 2001); *Ojeda-Terrazas* v. *Asheroft*, 290 F. 3d 292 (CA5 2002); *Faiz-Mohammad* v. *Ashcroft*, 395 F. 3d 799 (CA7 2005); *Alvarez-Portillo* v. *Ashcroft*, 280 F. 3d 858 (CA8 2002); 394 F. 3d 881 (CA10 2005) (case below); *Sarmiento Cisneros* v. *United States Attorney General*, 381 F. 3d 1277 (CA11 2004). The Courts of Appeals in the majority are themselves divided on the question whether an alien's marriage or application for adjustment of status before the statute's effective date (facts not in play here) renders the statute impermissibly retroactive when it is applied to the alien. See, *e.g.*, *Faiz-Mohammad*, *supra*, at 809–810 (application for adjustment of status); *Alvarez-Portillo*, *supra*, at 862. 867 (marriage).

statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926) (opinion for the Court by Brandeis, J.).

This Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment. We first look to "whether Congress has expressly prescribed the statute's proper reach," *Landgraf, supra*, at 280, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying "our normal rules of construction," *Lindh* v. *Murphy*, 521 U. S. 320, 326 (1997). If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf, supra*, at 278; see also *Lindh, supra*, at 326. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result." *INS* v. *St. Cyr*, 533 U. S. 289, 316 (2001); see *Martin* v. *Hadix*, 527 U. S. 343, 352 (1999) (quoting *Landgraf, supra*, at 280).

Fernandez-Vargas fights at each step of the way, arguing that Congress intended that INA §241(a)(5) would not apply to illegal reentrants like him who returned to this country before the provision's effective date; and in any event, that application of the provision to such illegal reentrants would have an impermissibly retroactive effect, to be avoided by applying the presumption against it. We

are not persuaded by either contention.[6]

A

Needless to say, Congress did not complement the new version of §241(a)(5) with any clause expressly dealing with individuals who illegally reentered the country before IIRIRA's April 1, 1997, effective date, either including them within §241(a)(5)'s ambit or excluding them from it. Fernandez-Vargas argues instead on the basis of the generally available interpretive rule of negative implication, when he draws attention to language governing temporal reach contained in the old reinstatement provision, but missing from the current one. Section 242(f) applied to "any alien [who] has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in . . . subsection (e)." 8 U. S. C. §1252(f) (1994 ed.). According to Fernandez-Vargas, since that before-or-after clause made it clear that the statute applied to aliens who reentered before the enactment date of the earlier version, its elimination in the current iteration shows that Congress no longer meant to cover preenactment reentrants. See *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930) ("deliberate selection of language . . . differing from that used in the earlier Acts" can indicate "that a change of law was in-

[6]The Government urges us to forgo *Landgraf* analysis altogether because §241(a)(5) regulates only a present removal process, not past primary conduct, citing our recent decision in *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004). Although we ultimately agree with the Government, in the abstract at least, that the reinstatement provision concerns itself with postenactment affairs, see *infra*, at 13–15, we find the Government's allusion to *Altmann* inapt. The Court's conclusion in that case, that *Landgraf* was to be avoided, turned on the peculiarities of the Foreign Sovereign Immunities Act. See *Altmann*, *supra*, at 694–696. Those peculiarities are absent here, and we thus advert to *Landgraf*, as we ordinarily do.

tended"); cf. 2B N. Singer, Statutes and Statutory Construction §51.04, p. 244 (6th rev. ed. 2000). But the clues are not that simple.

To begin with, the old before-or-after clause was sandwiched between references to departure or deportation under a deportation order and to grounds for deportation set out in a different subsection of the INA. It thus most naturally referred not to the illegal reentry but to the alien's previous deportation or departure. If its omission from the new subsection (a)(5) is significant, its immediate significance goes to the date of leaving this country, not the date of illegal return. Since the old clause referred to the date of enactment of the INA in 1952, the negative implication argument from dropping the language is that the reinstatement section no longer applies to those who left the country before that date. But, in 1996, application keyed to departures in 1952 or earlier was academic, and the better inference is that the clause was removed for that reason.[7]

If, moreover, we indulged any suggestion that omitting the clause showed an intent to apply §241(a)(5) only to deportations or departures after IIRIRA's effective date, the result would be a very strange one: it would exempt from the new reinstatement provision's coverage anyone who departed before IIRIRA's effective date but reentered after it. The point of the statute's revision, however, was obviously to expand the scope of the reinstatement authority and invest it with something closer to finality, and it would make no sense to infer that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.

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[7]We therefore need not entertain Fernandez-Vargas's argument that the provision's drafting history indicates that the language was eliminated deliberately.

Fernandez-Vargas sidesteps this problem (on a very generous reading of his argument) by making a more general suggestion of congressional intent: whatever the event to which the old law was tied, activity before as well as activity after it implicated the reinstatement power. Since the new law is bereft of such clarity, we should apply the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,'" *St. Cyr*, 533 U. S., at 320 (quoting *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 449 (1987)), which would effectively impose "[t]he presumption against retroactive application of ambiguous statutory provisions," *St. Cyr*, *supra*, at 320. If we did so, we would find that §241(a)(5) operates only to reentries after its effective date.

Even at this amorphously general level, however, the argument suffers from two flaws, the first being that it puts the cart before the horse. As Fernandez-Vargas realizes, he urges application of the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. But if that were legitimate, a statute lacking an express provision about temporal reach would never be construed as having a retroactive potential and the final two steps in the *Landgraf* enquiry would never occur (that is, asking whether the statute would produce a retroactive effect, and barring any such application by applying the presumption against retroactivity). It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. See 511 U. S., at 280.

The second flaw is the argument's failure to account for the new statute's other provisions on temporal reach, from which one might draw a negative inference that subsection (a)(5) was (or at least may well have been) meant to apply to reentries before its effective date. In contrast to their silence about the temporal sweep of §241(a)(5), the

1996 amendments speak directly to the scope of changes in provisions making reentry criminal and setting civil penalties. IIRIRA §324(c), 110 Stat. 3009–629, note following 8 U. S. C. §1326 (2000 ed.), provides that the expanded criminal prohibitions, see §1326(a), apply only to reentries or attempts after the effective date, and §105(b), 110 Stat. 3009–556, note following 8 U. S. C. §1325, provides the same as to civil penalties for illegal reentry, see §1325(b). The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively, see *Lindh*, 521 U. S., at 328, n. 4, for we require a clear statement for that, see *Martin*, 527 U. S., at 354. But these provisions do blunt any argument that removal of the before-or-after clause suffices to establish the applicability of §241(a)(5) only to posteffective date reentries. The fact is that IIRIRA sometimes expressly made changes prospective as from its effective date and sometimes expressly provided they were applicable to earlier acts; compare §§324(c) and 105(b), with §347(c), 110 Stat. 3009–639 (provision governing removal of aliens who have unlawfully voted is applicable "to voting occurring before, on, or after the date of the enactment of this Act"), and §351(c), *id.*, at 3009–640 (provision applicable to "waivers filed before, on, or after the date of the enactment of this Act"). With such a variety of treatment, it is just too hard to infer any clear intention at any level of generality from the fact of retiring the old before-or-after language from what is now §241(a)(5).

One conclusion can be stated, however. Common principles of statutory interpretation fail to unsettle the apparent application of §241(a)(5) to any reentrant present in the country, whatever the date of return.[8]

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[8]JUSTICE STEVENS states that when, in 1952, Congress inserted the before-or-after clause with the old §242(f), it was responding to the Immigration and Naturalization Service (INS) practice of applying the

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This facial reading is confirmed by two features of IIRIRA, not previously discussed, that describe the conduct to which §241(a)(5) applies, and show that the application suffers from no retroactivity in denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States.[9] One is in the text of that provision itself, showing that it applies to Fernandez-Vargas today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective. The second is the provision setting IIRIRA's effective date, §309(a), 110 Stat. 3009–625, which shows that Fernandez-Vargas had an ample warning of the coming change in the law, but chose

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reinstatement provision only to deportation orders issued after the provision's enactment, a practice that necessarily meant INS applied the provision only to postenactment reentries. By correcting the INS's interpretation only as to deportation orders, JUSTICE STEVENS suggests, Congress did nothing to disturb the practice as to reentries. And when it removed the obsolete before-or-after clause in 1996 without adding alternative language of temporal reach, the argument goes, Congress held fast to its intent in 1950 and 1952 to apply the reinstatement provision only to postenactment reentries. But the INS's practice circa 1951 of applying the reinstatement provision only to postenactment reentries followed from its policy regarding deportation orders, and in 1952 Congress might just as easily have assumed that the branch would go the way of the root. In any event, it is difficult to accept JUSTICE STEVENS's view that congressional understanding from 40 years back was intended to govern the IIRIRA reinstatement provision, given Congress's care to make the revised criminal and civil penalties applicable only to postenactment reentries.

[9] We would reach the same conclusion about denial of opportunities to apply for permission for voluntary departure as an alternative to removal, see 8 U. S. C. §1229c, and about cancellation of removal, see §1229b(b), if there were a need to deal with these matters separately. Although Fernandez-Vargas argues that he is being denied the chance to seek these forms of relief, he never applied for either of them and has not formally attempted to claim them in response to the reinstatement and removal proceedings.

to remain until the old regime expired and §241(a)(5) took its place.

As a preface to identifying the conduct by Fernandez-Vargas to which the reinstatement provision applies (the conduct that results in reinstating the old deportation order without the former opportunities to seek adjustment of status), a look at our holding in *St. Cyr*, 533 U. S. 289, is helpful. The alien, St. Cyr, was a lawful, permanent resident who made a plea agreement and pleaded guilty to an aggravated felony charge. Although the resulting conviction justified his deportation, when he entered his plea the law allowed him to seek a waiver of deportation at the discretion of the Attorney General. Between the plea and deportation proceedings, however, IIRIRA and another statute repealed the provision for that discretionary relief, converting deportation from a possibility to a certainty. *Id.*, at 325. The question was whether *Landgraf* barred application of the new law eliminating discretionary relief, on the ground that applying it to a defendant who pleaded guilty before the enactment of the new law would attach a further burdensome consequence to his plea, amounting to "a new disability, in respect to transactions or considerations already past," 533 U. S., at 321 (internal quotation marks omitted). The answer was that converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred. *Id.*, at 325. In making this "commonsense, functional judgment," *Martin, supra*, at 357, we emphasized that plea agreements "involve a *quid pro quo* between a criminal defendant and the government," *St. Cyr*, 533 U. S., at 321, in which a waiver of "constitutional rights (including the right to a trial)," had been exchanged for a "perceived benefit," *id.*, at 322, which in practical terms was valued in light of the possible discretionary relief, a focus of expectation and reliance, *id.*, at 323.

St. Cyr's agreement for a *quid pro quo* and his plea were entirely past, and there was no question of undoing them, but the "transactio[n] or consideratio[n]" on which §241(a)(5) turns is different.[10] While the law looks back to a past act in its application to "an alien [who] has reentered . . . illegally," 8 U. S. C. §1231(a)(5), the provision does not penalize an alien for the reentry (criminal and civil penalties do that); it establishes a process to remove him "under the prior order at any time after the reentry." *Ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

That in itself is enough to explain that Fernandez-Vargas has no retroactivity claim based on a new disabil-

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[10] We understand Fernandez-Vargas's claim as falling within the second of Justice Story's categories of retroactivity (new consequences of past acts), not the first category of canceling vested rights. The forms of relief identified by Fernandez-Vargas as rendered unavailable to him by §241(a)(5) include cancellation of removal, see 8 U. S. C. §1229b(b), adjustment of status, see §1255, and voluntary departure, see §1229c. These putative claims to relief are not "vested rights," a term that describes something more substantial than inchoate expectations and unrealized opportunities. In contrast to "an immediate fixed right of present or future enjoyment," *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 646, 673 (1896) (internal quotation marks omitted), Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. It is not that these forms of relief are discretionary, cf. *St. Cyr*, 533 U. S., at 325; it is rather that before IIRIRA's effective date Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement, see *supra*, at 11–12.

ity consequent to a completed act, but in fact his position is weaker still. For Fernandez-Vargas could not only have chosen to end his continuing violation and his exposure to the less favorable law, he even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility by leaving the country and ending his violation in the period between enactment of §241(a)(5) and its effective date. IRRIRA became law on September 30, 1996, but it became effective and enforceable only on "the first day of the first month beginning more than 180 days after" IIRIRA's enactment, that is, April 1, 1997. §309(a), 110 Stat. 3009–625. Unlawful alien reentrants like Fernandez-Vargas thus had the advantage of a grace period between the unequivocal warning that a tougher removal regime lay ahead and actual imposition of the less opportune terms of the new law. In that stretch of six months, Fernandez-Vargas could have ended his illegal presence and potential exposure to the coming law by crossing back into Mexico.[11] For

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[11] In a series of letters submitted to the Court after oral argument, the parties dispute the consequences if Fernandez-Vargas had left voluntarily after IIRIRA's enactment and, specifically, the period of inadmissibility to which Fernandez-Vargas would thereupon have been subject. Because we conclude that §241(a)(5) does not operate on a completed pre-enactment act, we need not consider the retroactive implications either of the fact of his inadmissibility or of any variance between the period of inadmissibility upon a postenactment voluntary return and that prescribed under the old regime. The period of inadmissibility stems from an alien's illegal reentry within a specified time after a prior removal and is applicable to Fernandez-Vargas because he reentered shortly after his 1981 deportation, but Fernandez-Vargas does not challenge as impermissibly retroactive IIRIRA's lengthening of that period from 5 to 10 or 20 years, see 8 U. S. C. §1182(a)(6)(B) (1994 ed.); §1182(a)(9)(A)(ii) (2000 ed.).

In any event, any period of inadmissibility is subject to waiver by the Attorney General, see §1182(a)(6)(B) (1994 ed.); §1182(a)(9)(A)(iii) (2000 ed.), and presumably Fernandez-Vargas could plead his serious case for such a waiver (his marriage, his child) in seeking legal reentry

that matter, he could have married the mother of his son and applied for adjustment of status during that period, in which case he would at least have had a claim (about which we express no opinion) that proven reliance on the old law should be honored by applying the presumption against retroactivity.[12]

Fernandez-Vargas did not, however, take advantage of the statutory warning, but augmented his past 15 years of unlawful presence by remaining in the country into the future subject to the new law, whose applicability thus turned not on the completed act of reentry, but on a failure to take timely action that would have avoided application of the new law altogether. To be sure, a choice to avoid the new law before its effective date or to end the continuing violation thereafter would have come at a high personal price, for Fernandez-Vargas would have had to leave a business and a family he had established during his illegal residence. But the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law. What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect. He claims a right to continue illegal conduct indefinitely under the terms on which it began, an entitlement of legal stasis for those whose lawbreaking is continuous. But "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." L. Fuller, The Morality of Law 60 (1964) (quoted in *Landgraf*, 511 U. S., at 269, n. 24).[13]

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to the United States.

[12] See 394 F. 3d, at 890, and n. 11 (distinguishing Fernandez-Vargas's circumstance from that of aliens who had married, or both married and applied for adjustment of status, before IIRIRA's effective date).

[13] This is the nub of our disagreement with JUSTICE STEVENS. He says

Because we conclude that §241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas, we affirm the judgment of the Court of Appeals.

It is so ordered.

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it misses the point to say that Fernandez-Vargas could avoid the new law by returning to Mexico, which he thinks is like saying that a defendant could avoid a retroactive criminal penalty by locking himself up for 10 years. *post,* at 5, n. 2. JUSTICE STEVENS thus argues that reimposing an order of removal to end illegal residence is like imposing a penalty for a completed act (the defendant's unspecified act in his analogy). But even on his own analysis, Fernandez-Vargas continued to violate the law by remaining in this country day after day, and JUSTICE STEVENS does not deny that the United States was entitled to bring that continuing violation to an end. He says, however, that Congress should not be understood to provide that if the violation continues into the future it may be ended on terms less favorable than those at the beginning. But this is not the position that retroactivity doctrine imputes to an inexplicit Congress. Fernandez-Vargas may have an equitable argument that the Government should not, for the future, eliminate an opportunity for continuing illegality accompanied by the hopes that long illegal residence and a prospect of marriage gave him in the past. But Congress apparently did not accept such an argument, which could prevail here only if the presumption against retroactivity amounted to a presumption of legal stasis for the benefit of continuous lawbreakers.

SUPREME COURT OF THE UNITED STATES

No. 04–1376

HUMBERTO FERNANDEZ-VARGAS, PETITIONER *v.* ALBERTO R. GONZALES, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 22, 2006]

JUSTICE STEVENS, dissenting.

In 1982, petitioner Humberto Fernandez-Vargas, an alien who had previously been deported, reentered the United States illegally. Over the next 20 years, petitioner remained here. He worked as a truckdriver, owned a trucking business, fathered a child, and eventually married the child's mother, a United States citizen. The laws in place at the time of petitioner's entry and for the first 15 years of his residence in this country would have rewarded this behavior, allowing him to seek discretionary relief from deportation on the basis of his continued presence in and strong ties to the United States. See 8 U. S. C. §1254(a)(1) (1994 ed.).

In 1996, however, Congress passed a new version of the applicable provision eliminating almost entirely the possibility of relief from deportation for aliens who reenter the country illegally having previously been deported. See Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), §305(a)(3), 110 Stat. 3009–599, 8 U. S. C. §1231(a)(5) (2000 ed.); see also *ante*, at 3, n. 4. The 1996 provision is silent as to whether it was intended to apply retroactively to conduct that predated its enactment.[1]

[1]The statutory provisions expanding the class of people to whom criminal penalties for illegal reentry might apply, however, explicitly

Despite a historical practice supporting petitioner's reading, and despite the harsh consequences that attend its application to thousands of individuals who, like petitioner, entered the country illegally before 1997, the Court not only holds that the statute applies to preenactment reentries but also that it has no retroactive effect. I disagree with both of these conclusions.

I

In 1950, when Congress first gave the Attorney General the authority to reinstate an order of deportation, it enacted a reinstatement provision containing no explicit temporal reach.[2] See Internal Security Act, §23(d), 64 Stat. 1012, 8 U. S. C. §156(d) (1946 ed., Supp. V). The natural reading of this provision, the one most consistent with the "deeply rooted" traditional presumption against retroactivity, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994), is that it would apply to deportations that occurred before the provision's enactment but not to preenactment reentries. While both deportation and reentry can constitute "events completed before [the provision's] enactment," *id.*, at 270, an alien's reentry is the act that triggers the provision's operation and is therefore the act to which the provision attaches legal consequences.

When the Immigration and Naturalization Service (INS) promulgated regulations implementing the 1950 statute, however, it did not read the statute so naturally. Instead, the INS' regulations, embodying an overly strong version

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apply only to postenactment reentries. See IIRIRA, §324(c), 110 Stat. 3009–629, note following 8 U. S. C. §1326.

[2]The provision stated:

"Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous war-rant of deportation against him shall be considered as reinstated from its original date of issuance." 64 Stat. 1012, codified as 8 U. S. C. §156(d) (1946 ed., Supp. V).

of the presumption against retroactivity, provided that an order of deportation could only be reinstated if that deportation occurred after the statute's enactment date. See 8 CFR §152.5 (1950 Cum. Supp.). Thus, the INS read the reinstatement provision as inapplicable even to reentries that occurred *after* the statute's enactment date if the underlying deportation had been entered before that date; it follows *a fortiori* that the provision was considered inapplicable to reentries that occurred before the statute's enactment.

Congress corrected the INS' error two years later by adding the clause "whether before or after the date of enactment of this Act." Immigration and Nationality Act, §242(f), 66 Stat. 212, 8 U. S. C. §1252(f) (1994 ed.); see also *ante*, at 2, and nn. 2–3. As the Court correctly notes, that amendment "most naturally referred not to the illegal reentry but to the alien's previous deportation or departure." *Ante*, at 8. The best interpretation of Congress' intent with regard to the 1952 statute, then, was that it meant to apply the reinstatement provision to preenactment deportations but to preserve the status quo with regard to preenactment reentries: In accordance with the traditional presumption against retroactivity, preenactment reentries would remain uncovered by the reinstatement provision.

In 1996, when Congress enacted the current reinstatement provision, it drafted a version of the statute that, like its 1950 predecessor, was silent as to its temporal reach. See 8 U. S. C. §1231(a)(5) (2000 ed.). If we assume (as the Court does) that the addition of the "before-or-after" clause in the 1952 statute merely clarified Congress' original intent in 1950 to make the provision applicable to preenactment departures without authorizing any application to preenactment reentries, it is reasonable to attribute precisely the same intent to the Congress that enacted the 1996 statute: As in the 1950 and 1952 ver-

sions of the provision, Congress intended the 1996 reinstatement provision to apply to preenactment deportations but not to preenactment reentries.

In sum, our normal rules of construction support the reasonable presumption that Congress intended the provision to cover only postenactment reentries. Accordingly, the 1996 reinstatement provision should not be construed to apply to petitioner's earlier entry into the United States.

II

The Court not only fails to give the 1996 Act its most normal interpretation, but also erroneously concludes that the provision does not have any retroactive effect. The Court reaches this conclusion based on its judgment that the provision applies not to conduct that occurred before the statute's enactment date, but rather to "an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country." *Ante*, at 13. This reasoning is unpersuasive.

It is true, of course, that the order of deportation entered against petitioner in 1981 could not be reinstated unless he was present in the United States, and that, until he was arrested in 2003, petitioner could have chosen to leave the United States. But it is precisely petitioner's "continuing violation" that allowed him to be eligible for relief from deportation in the first place: He was required to have been physically present in the United States for a period of not less than seven years, to have been a person of good moral character during that time, and to have developed ties to the United States such that his deportation would result in extreme hardship to himself or to his United States citizen wife or child.[3] See 8 U. S. C.

[3]Although petitioner became eligible for relief from deportation after being physically present in the United States for seven years, he could not apply for that relief until the Government placed him in deporta-

§1254(a)(1) (1994 ed.); see also *INS* v. *Phinpathya*, 464 U. S. 183 (1984) (strictly construing physical presence requirement). Moreover, under the pre-1996 version of the reinstatement provision, the longer petitioner remained in the United States the more likely he was to be granted relief from deportation. See *Matter of Ige*, 20 I. & N. Dec. 880, 882 (1994) (listing factors considered in evaluating extreme hardship requirement, including alien's length of residence in United States, family in United States, business or occupation, and position in community).

Given these incentives, petitioner legitimately complains that the Government has changed the rules midgame. At the time of his entry, and for the next 15 years, it inured to petitioner's benefit for him to remain in the United States continuously, to build a business, and to start a family. After April 1, 1997, the date on which the applicable reinstatement provision became effective, all of these activities were rendered irrelevant in the eyes of the law. Only the Court's unfortunately formalistic search for a single "past act that [petitioner] is helpless to undo," *ante*, at 13, allows it to conclude that the provision at issue has no retroactive effect.[4] For regardless of whether his

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tion proceedings, at which point he could raise his eligibility as an affirmative defense. Cf. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951–952 (1997) (applying presumption against retroactivity to statute eliminating affirmative defense).

[4]Even on its own terms the Court's logic is troubling. The Court believes that petitioner could have avoided being affected by the 1996 reinstatement provision, not just retroactively but in any way whatsoever, by leaving the country prior to its effective date—a date that occurred six months after the statute's enactment date not to give aliens "ample warning," *ante*, at 11, 13, but instead to allow the Attorney General to prepare for the substantial changes caused by the IIRIRA and to promulgate regulations to effectuate that Act. See §309, 110 Stat. 3009–625. But had petitioner "take[n] advantage of the statutory warning," *ante*, at 15, he would have imposed upon himself

1982 reentry was or was not an act that he could now "undo," it is certainly an act to which the 1996 reinstatement provision has attached serious adverse consequences. Because the provision has an undeniably harsh retroactive effect, "absent a clear indication from Congress that it intended such a result," *INS* v. *St. Cyr*, 533 U. S. 289, 316 (2001), we should apply the presumption against retroactivity and hold that the 1996 reinstatement provision does not apply to petitioner.

Accordingly, I respectfully dissent.

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the very same punishment—the guarantee of removal to Mexico—that he hopes to avoid. Just as we would not say that a defendant may avoid the retroactive application of a criminal statute by locking himself up for 10 years, it cannot be that petitioner's ability to leave the country of his own accord somehow helps to prove that the provision at issue has no retroactive effect.